THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

BENGAL SECRETARIAT LIBRARY.

Probate Division.

CASES DETERMINED IN THE

COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—A. P. STONE, BARRISTER-AT-LAW.

REPORTERS.

Privy Council	HERBERT COWELL,	*Barrister-at-Law.*
Court of Appeal	MARTIN WARE, H. CADMAN JONES, E. S. ROSCOE,	*Barristers-at-Law.*
Probate and Divorce	W. LEYCESTER,	*Barrister-at-Law.*
Admiralty and Ecclesiastical Cases	E. S. ROSCOE,	*Barrister-at-Law.*

VOL. XV.

1890.—LIII AND LIV VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1890.

BENGAL SECRETARIAT LIBRARY.

JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

LIII AND LIV VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

LIII AND LIV VICTORIÆ.

Lord HALSBURY, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

LORD ESHER, Master of the Rolls.

Sir JAMES HANNEN, President of the Probate, Divorce and Admiralty Division.

Sir HENRY COTTON,
Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,
Sir HENRY CHARLES LOPES,
} Ordinary Judges of Court of Appeal.

BENGAL SECRETARIAT LIBRARY.

The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1891, will be as follows :—

In the First Series,
[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

In the Second Series,
[1891] 1 Q. B. [1891.] 2 Q. B. [1891] P.

In the Third Series,
[1891] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

		PAGE
Accomac, The	(C. A.)	208
Ashley (Anne), In the Goods of		120
Attorney General, Brinkley *v.*		76

B.

Batavier, The	(C. A.)	37
Benyon *v.* Benyon		29
——— *v.* ———	(C. A.)	54
Borough *v.* Collins		81
Brinkley *v.* Attorney General		76
Butler *v.* Butler		13
——— *v.* ———		32
——— *v.* ———	(C. A.)	126
——— *v.* ———	(C. A.)	66
——— *v.* ———		161

C.

Callaway, In the Goods of		147
Carisbrook, The		98
Carron Park, The		203
Cashmere, The		121
City of Lincoln, The	(C. A.)	15
Clark (Amelia), In the Goods of		10
Clook, In re	(C. A.)	132
Collins, Borough *v.*		81
Cook *v.* Cook		116
Cope, In the Goods of		107
Coriolanus, The		103
Cornish *v.* Cornish		131
Covell, In the Goods of		8
Crawford, In the Goods of		212

D.

De la Rue, In the Goods of		185
De Lossy *v.* De Lossy		115
Duke of Buccleuch, The	(C. A.)	86

E.

Eccles, In the Goods of		1
Evans (Timothy), In the Goods of		215

F.

PAGE

Ferguson-Davie *v.* Ferguson-Davie 109
Five Steel Barges 142
Foden, Milnes *v.* 105
Fry *v.* Fry 25
—— *v.* —— (C. A.) 50

H.

Harris *v.* Knight (C. A.) 170
Hornbuckle, In the Goods of 149

I.

Isle of Cyprus, The 134

K.

Knight, Harris *v.* (C. A.) 170

L.

Leven and Melville (Earl of), In the Goods of 22
Lister *v.* Lister (C. A.) 4
Lodge *v.* Lodge 159
Long *v.* Long 218

M.

Magneta, The 101
Mark Lane, The 135
Merchant Taylors' Company, Tyler *v.* 216
Mills *v.* Millward 20
Millward, Mills *v.* 20
Milnes *v.* Foden 105
Morris, In the Goods of 9

N.

Nunneley *v.* Nunneley 186

O.

PAGE

Orchis, The (C. A.) 38
O'Shea *v.* O'Shea. Ex parte Tuohy (C. A.) 59

Q.

Quickstep, The 196

R.

Ruby, The 139
——, The (C. A.) 164
Russell (G. B.), In the Goods of 111

S.

Sargent, In re (Ct. Arches) 168
Slinn, In the Goods of 156
Smith (E. J.), In the Goods of 2
—— *v.* Smith 11
—— *v.* —— (C. A.) 47
Stakesby, The 166
Swift *v.* Swift 118

T.

Talabot, The 194
Theobald *v.* Theobald 26
Trubner *v.* Trubner 24
Tuohy, Ex parte. O'Shea *v.* O'Shea (C. A.) 59
Tyler *v.* Merchant Taylors' Company 216

W.

Warter *v.* Warter 35
—— *v.* —— 152
Warwick, The 189

TABLE OF CASES CITED.

A.

		PAGE
A. B. (Clerk), In the matter of	11 P. D. 56	82
Adams v. Lancashire and Yorkshire Railway Company	Law Rep. 4 C. P. 739	16
Airey v. Bower	12 App. Cas. 263	105
Alexander, In the Goods of	29 L. J. (P. & M.) 93	214
Alexandre v. Alexandre	Law Rep. 2 P. & D. 164	72, 74
American and the Syria, The	Law Rep. 6 P. C. 127	198
Andrew v. Motley	12 C. B. (N.S.) 514	175
Ardraseer Cursetjee v. Perezeboye	10 Moo. P. C. 419	78
Argentino, The	14 App. Cas. 519	16, 18
Astor, In the Goods of	1 P. D. 150	148, 185, 214

B.

Barber, In the Goods of	1 P. & D. 267	175, 176
Barden, In the Goods of	Law Rep. 1 P. & D. 325	150
Bardin v. Calcott	1 Hagg. Consist. Rep. 14	169
Barker v. McAndrew	34 L. J. (C.P.) 191	205, 206, 210
Barnes v. Barnes	Law Rep. 1 P. & D. 505	69
Bates v. Townley	2 Ex. 152	39
Belbin v. Skeats	1 Sw. & Tr. 148	175
Bethell v. Hildyard	38 Ch. D. 220	78
Bianca, The	8 P. D. 91	198
Biola, The	34 L. T. 185	135
Bond v. The brig Cora	2 Washington, 80	104
Bradshaw, In the Goods of	13 P. D. 18	8
Branston, The	2 Hagg. 3 n.	104
Brown, In the Goods of	1 Sw. & Tr. 32	175
——— v. Brown	8 Ell. & Bl. 876	175
Brownrigg v. Pike	7 P. D. 61	150
Bruce v. Nicolopulo	11 Ex. 129	205, 206, 210
Buckhurst, The	6 P. D. 152	37
Burder v. ———	3 Curteis, 822	82, 83
Burgoyne v. Showler	1 Rob. 5	176, 180, 181
Burrell, In the Goods of	1 Sw. & Tr. 64	2

C.

Callan, In the Goods of	9 Ir. Eq. Rep. 484	175
Canada Shipping Company v. British Shipowners, &c., Association	23 Q. B. D. 342	210
Cannon v. Smalley	10 P. D. 96	51

		PAGE
Carmichael *v.* Liverpool Sailing Ship, &c., Association	19 Q. B. D. 242	210
Cargo ex Woosung, The	1 P. D. 260	136, 138
Carr *v.* Stringer	E. B. & E. 123	122, 125
Cavendish *v.* Cavendish and Rochefoucauld	38 L. J. (P. & M.) 13	30, 57
Charlton *v.* Hindmarsh	8 H. L. C. 160	175
Chetwynd *v.* Chetwynd	Law Rep. 1 P. & D. 39	4
Chieftain, The	4 N. of Cas. 459	143
Cock *v.* Cooke	Law Rep. 1 P. & D. 241	158
Cohn *v.* Davidson	2 Q. B. D. 455	205
Coles, In the Goods of	Law Rep. 2 P. & D. 362	158
Commissioners of River Wear *v.* Adamson	2 App. Cas. 743	198
Connolly *v.* Woolrich	11 Low. Can. Jur. 197	78
Conservators of the River Thames *v.* Hall	Law Rep. 3 C. P. 415	123
Coode, In the Goods of	Law Rep. 1 P. & D. 449	148
Corbett *v.* Corbett	13 P. D. 136; 14 P. D. 7	5
Countess of Durham, The	9 Monthly Law Mag. 357	16
Crewe *v.* Crewe	3 Hagg. Eccl. Rep. 123	69
Crooks *v.* Allan	5 Q. B. D. 38	205
Crow *v.* Falk	8 Q. B. 467	205, 206
Cleadon, The	Lush. 158	198
Cleverly *v.* Gladdish	2 S. & T. 335	108
Cutto *v.* Gilbert	9 Moo. P. C. 131	175

D.

Davies *v.* M'Veagh	4 Ex. D. 265	100
Dickinson *v.* Kitchen	8 E. & B. 789	42
Dingor *v.* Matthews	88 L. T. (Journ.) 139	123
Doe d. Davies *v.* Davies	9 Q. B. 648	175
——— Harborne *v.* Lewis	7 Car. & P. 574	175
Duchy of Cornwall, The Solicitor to the, *v.* Canning	5 P. D. 114	108
Duke of Sussex, The	1 W. Rob. 270	198
Dunn *v.* Dunn	13 P. D. 91	14
Durham's (Lord) Case	10 P. D. 80	51

E.

Edmunds *v.* Wallingford	14 Q. B. D. 811	42, 43, 44
Edwards *v.* Aberayron Mutual Ship Insurance Society	1 Q. B. D. 563	191
Energy, The	Law Rep. 3 A. & E. 48	198
Ettrick, The	6 P. D. 127	205

F.

Fanny M. Carvill, The	13 App. Cas. 455 n.	90, 91, 93, 95, 96, 97
Farmer *v.* Farmer	9 P. D. 245	160
Fawcus *v.* Sarsfield	6 E. & B. 192	205
Fenwick, In the Goods of	Law Rep. 1 P. & D. 319	113

		PAGE
Field *v.* Field	14 P. D. 26	12, 48, 49
Fisher *v.* Fisher	2 Sw. & Tr. 410	4
Fitzroy (Sir C.), In the Goods of	1 S. & T. 133	112, 113
Flower *v.* Flower	Law Rep. 3 P. & D. 132	126, 130
Flying Fish, The	Br. & L. 436	16
Freston, In re	11 Q. B. D. 545	60

G.

Garcia *v.* Garcia	13 P. D. 216	160
Garnett *v.* Bradley	3 App. Cas. 944	123
Gipsey King, The	2 W. Rob. 537	198
Giraffe, The	1 Pritch. Ad. Dig. 3rd ed. 235	198
Gladstone *v.* Gladstone	1 P. D. 442; 3 P. D. & 260	5, 30, 31, 33, 34, 56, 57, 58, 127, 128
Glenfruin, The	10 P. D. 103	204
Good *v.* London Steamship Owners Association	Law Rep. 6 C. P. 563	210
Guy Mannering, The	7 P. D. 132	164

H.

Hancock *v.* Peaty	Law Rep. 1 P. & D. 335	51
Harris, In the Goods of	Law Rep. 2 P. & D. 83	214
Harrison *v.* Harrison	12 P. D. 130	5
Hart *v.* Hart	18 Ch. D. 670	5
Harvey *v.* Farquhar	Law Rep. 2 H. L. (Sc.) 19	187
Hector, The	8 P. D. 218	202
Hoare, In the Goods of	2 Sw. & Tr. 361 n.	8
Hope, The	3 Hagg. 423	104
Huble *v.* Clark	1 Hagg. Ecc. R. 115	175
Hunt *v.* Clarke	61 L. T. 343	60
Hunt *v.* Hunt	47 L. J. R. (N.S.) P. D. & A. 22	69, 74
Hunter *v.* Hunter	10 P. D. 93	51
Hyde *v.* Hyde and Woodmansee	Law Rep. 1 P. & D. 130	78

I.

Isca, The	12 P. D. 34	198
Imbro, The	14 P. D. 73	166, 167

J.

Jacobs *v.* Dawkes	50 L. J. (Q. B.) 446	123
Jane Bacon, The	27 W. R. 35	198
Jenkins, In the Goods of	3 Phill. Ecc. 33	8
Jersey (Dean of) *v.* Rector of ——	3 Moo. P. C. 229	82
Johnson, In re	20 Q. B. D. 68	60
——— *v.* Chapman	35 L. J. (C. P.) 23	205
——— *v.* Johnson's Administrator	30 Missouri State Rep. 72	78
——— *v.* Royal Mail Steam Packet Company	Law Rep. 3 C. P. 38	39
Jonas *v.* Long	20 Q. B. D. 564	123

		PAGE
Jones *v.* Boyce	1 Stark. 493	16, 18
—— *v.* Corporation of Liverpool	14 Q. B. D. 890	198
—— *v.* Jones	Law Rep. 2 P. & D. 333	14, 128
Jordan, In the Goods of	Law Rep. 1 P. & D. 555	150, 177
Julia, The	Lush. 224	198

K.

Khedive, The	5 App. Cas. 876	90
Kingalock, The	1 Spinks, 263	143
Kingston-by-Sea	3 W. Rob. 152	198
Kingston's (Duchess of) Case	2 Sm. L. C. 9 ed. 812	85

L.

Lambton, Ex parte	Law Rep. 10 Ch. 405	143
Lampleigh *v.* Braithwaite	1 Sm. L. C. 8 ed. 151	39
Lapwing, The	7 App. Cas. 512	90
Laugher *v.* Pointer	5 B. & C. 547	200
Lawrie *v.* Douglas	15 M. & W. 746	210, 211
Lincoln (Bishop of) *v.* Day	4 Notes of Cases, 299	82
Littlewood *v.* Williams	6 Taunt. 277	169
Loveden *v.* Loveden	Phill. 208	14

M.

M'Vicar, In the Goods of	Law Rep. 1 P. & D. 671	113
March *v.* March and Palumbo	Law Rep. 1 P. & D. 440	30, 56
Mary, The	5 P. D. 14	198
Medina, The	2 P. D. 5	136, 138
Medley *v.* Medley	7 P. D. 122	5
Mellona, The	3 Wm. Rob. 7	16
Mitchell *v.* Simpson	23 Q. B. D. 373	123
Murphy *v.* Coffin	12 Q. B. D. 87	99, 100

N.

Naples, The	11 P. D. 124	37
Nelson *v.* Dahl	12 Ch. D. 568	100
Neptune, The	1 Wm. Rob. 297	143
Nevill *v.* Baker	Quoted in 1 Phill. 845	169
Niobe, The	13 P. D. 55	198
Noble *v.* Holt	York Herald (1883)	82
Notting Hill, The	9 P. D. 105	16

O.

O'Dwyer *v.* Geare	1 S. & T. 465	150

P.

Palinurus, The	13 P. D. 14	166, 167
Pencher, The	Swa. 211	16

		PAGE
Pirie *v.* Middle Dock Company	44 L. T. (N.S.) 426	205
Podmore *v.* Whatton	3 Sw. & Tr. 449	175
Pollard, In re	Law Rep. 2 P. C. 106	60
Ponsford *v.* Johnson	2 Blatchford, 51	154, 155
Pridham, In re	61 L. T. 302	133
Pyman *v.* Dreyfus	24 Q. B. D. 152	100

Q.

Quarman *v.* Burnett	6 M. & W. 499	200
Quick *v.* Quick	3 Sw. & Tr. 442	175

R.

Radnorshire, The	5 P. D. 172	135
Rapid, The	3 Hagg. 419	143
Reg. *v.* Barnardo	23 Q. B. D. 305	60, 61, 63, 64, 65
—— *v.* Jordan	36 W. R. 589; W. N. (1888) p. 152	60, 62, 64
Robertson *v.* Robertson	6 P. D. 119	127, 130
———— *v.* Smith and Lawrence	Law Rep. 2 P. & D. 43	158
Rugg *v.* Kingsmill	Law Rep. 2 P. C. 59	169

S.

Salacia, The	2 Hagg. 269	104
Sara, the	14 App. Cas. 209	39
Schloss *v.* Heriot	14 C. B. (N.S.) 59	205
Scott *v.* Attorney General	11 P. D. 128	153, 154, 155
Sharman, In the Goods of	Law Rep. 1 P. & D. 661	3
Sidney *v.* Sidney	4 Sw. & Tr. 178	5
Silesia, The	5 P. D. 177	136, 138
Sinquasi, The	5 P. D. 241	198
Skipworth's Case	Law Rep. 9 Q. B. 230	61
Slader *v.* Smalbrooke	1 Lev. 138	82
Sly *v.* Sly & Dredge	2 P. D. 91	175
Smart, In the Goods of	9 P. D. 64	148
Smith *v.* The Creole	2 Wallace, Jr., Rep. 485	198
Steel *v.* State Line Company	3 App. Cas. 72	204, 207
Stormcock, The	5 Asp. (M.C.) (N.S.) 470	198
Strang, Steel & Co. *v.* Scott & Co.	14 App. Cas. 601	205, 207
Sturgis *v.* Boyer	24 Howard's Rep. 110	201
Sugden *v.* Lord St. Leonards	1 P. D. 154	179
Swansea, The	4 P. D. 115	37

T.

Tasmania, The	13 P. D. 110	198
Tatnall *v.* Hankey	2 Moo. P. C. 342	214
Thanet's (Earl of) Case	State Trials, vol. xxvii. p. 822	61
Tharp, In the Goods of	3 P. D. 76	36
Thomas, In the Goods of	1 Sw. & Tr. 255	176, 177, 180
Tichborne *v.* Tichborne	Law Rep. 1 P. & D. 730	215
Ticonderoga, The	Swa. 215	198

		PAGE
Tomlinson, In the Goods of	6 P. D. 209	151
Trott *v.* Skidmore	2 Sw. & Tr. 12	176, 180
Turner *v.* Hancock	20 Ch. D. 303	127
Two Ellens, The	Law Rep. 4 P. C. 161	198

U.

Undaunted, The	11 P. D. 46.	204

V.

Vera Cruz, The	9 P. D. 88	102

W.

Warrender *v.* Warrender	2 Cl. & F. 488	78
Wells *v.* Wells	3 Sw. & Tr. 542	14
Wharram *v.* Wharram	3 Sw. & Tr. 303	175
Whitmore *v.* Whitmore	Law Rep. 1 P. & D. 96	127, 128
Wilson *v.* Newport Dock Company	Law Rep. 1 Ex. 177	16
Woodhall, Ex parte	20 Q. B. D. 832	60, 61
Woodward *v.* Goulstone	11 App. Cas. 469	175
Wright *v.* Rogers	38 L. J. (N.S.) (P. & M.) 67	180

BENGAL SECRETARIAT LIBRARY.

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

LIII. VICTORIÆ.

IN THE GOODS OF ECCLES.

1889 *Nov.* 19.

Administration—Pauper Lunatic—Grant to Nominee of Guardians.

The husband of a deceased intestate was a lunatic pauper confined in a county asylum at the charge of the guardians of his union. Notice having been given to his next of kin and no appearance entered, the Court made a grant to the guardians for the use and benefit of the lunatic, and limited to such time as he should remain insane.

MRS. CATHERINE ECCLES died intestate, entitled to property valued at 300*l.* Her husband, Thomas Eccles, was a lunatic —not found so by inquisition—confined in the Lancaster county asylum at the charge of the guardians of the Ormskirk Union, who had expended 170*l.* on his maintenance.

The guardians of the union had appointed their officer to take out a grant of administration on their behalf as having the care of the lunatic entitled to administration. Notice of the motion had been served on the lunatic's father, who was an inmate of the Ormskirk workhouse, but no appearance had been entered on his behalf.

1889

IN THE GOODS OF ECCLES.

Middleton, moved for a grant of administration to the officer nominated by the guardians, under the 73rd section of the Court of Probate Act (20 & 21 Vict. c. 77), and cited *In the Goods of Mary Burrell.* (1)

BUTT, J. I think the circumstances are sufficiently special to justify me in making a grant to the guardians as the persons having charge of the lunatic, for his use and benefit, and limited to such time as he may remain insane.

Solicitor: *Toller.*

W. L.

Nov. 19.

IN THE GOODS OF E. J. SMITH.

Will—Signature of Legatee written under Attestation Clause—Omission of Name in Probate.

After a will had been executed, and duly attested by two attesting witnesses, the wife of the testator, who was also an executor, and took a life interest in the whole estate, signed her name to the will by the testator's request, not with the object of attesting it, but in order to verify its contents.

The Court granted an application for probate of the will omitting the signature of the wife upon proof that notice of the application had been served upon a guardian appointed by the Court to represent children who had a reversionary interest in the will and were minors, and that no appearance had been entered.

APPLICATION for probate of the will of E. J. Smith, omitting the signature of Emma Smith, the testator's wife.

E. J. Smith, late of Failsworth, in the county of Lancaster, duly executed his last will and testament on July 24, 1884. He bequeathed to his wife, Emma Smith, all his real and personal estate for her use absolutely, and on her death or re-marriage he directed it to be divided equally between her seven children. He appointed his wife Emma Smith and John Hough his executors.

The will was drawn up on a printed form, at the end of which were two lines linked together by a hyphen for the names of the attesting witnesses. Here the two attesting witnesses John Catteral and John Hough signed their names, and the testator

(1) 1 Sw. & Tr. 64.

had signed his name twice—once at the end of the will, and again opposite the names of the attesting witnesses.

Under the names of the attesting witnesses the wife signed her name; but it appeared from an affidavit which she made that she signed her name after the will had been executed, not with the intention of attesting it, but at her husband's request, to verify its contents, he being under the impression that it would not be valid if her name was not affixed to the will. Neither of the attesting witnesses saw her sign, and could give no explanation as to how her name appeared there. Of the seven children five were minors: and the two of full age were consenting parties to the motion.

R. H. Pritchard, on behalf of the executors, moved for probate of the will omitting the name of the wife, and cited *In the Goods of Sharman.* (1)

BUTT, J. I cannot make the grant until the five children who are minors have had notice served on them of what may be the result to their interests of removing their mother's name from the probate. It will not do to serve notice on the mother, as she has an adverse interest, but the registrar may appoint some person who will see to their interests and who may be served with notice on their behalf.

On November 19, *R. H. Pritchard,* renewed the application, and read an affidavit stating that the registrar had appointed John Catteral and Richard Lythgoe as guardians of the said minors to be served with notice on their behalf of the motion; that notice had been duly served on them and that no appearance had been entered.

BUTT, J., thereupon directed the grant of probate to go as prayed, omitting the name of the wife.

Solicitors: *Field & Roscoe.*

(1) Law Rep. 1 P. & D. 661.

W. L.

1889
Nov. 7, 19.

[IN THE COURT OF APPEAL.]

LISTER *v.* LISTER.

*Divorce—Permanent Maintenance—Dum sola Clause—*20 *&* 21 *Vict. c.* 85, *s.* 32.

The Court in making an order, upon a decree for dissolution of marriage, that the husband shall pay to his wife an annual sum of money for her permanent maintenance, has, under 20 & 21 Vict. c. 85, s. 32, an absolute discretion, according to the circumstance of each case, either to order the payment during the whole of her life or so long as she remains unmarried.

The decision of Butt, J. (14 P. D. 175) refusing to confine the operation of an order under 20 & 21 Vict. c. 85, s. 32, to such period as the petitioner remained unmarried, affirmed.

APPEAL from an order of Butt, J. (14 P. D. 175), varying the report of the registrar as to the permanent maintenance of the wife, on a petition for dissolution of marriage on account of the adultery and cruelty of the husband. A decree absolute having been pronounced, the wife applied for an order for permanent maintenance out of her husband's property. There were no children of the marriage, and the wife had no property at the time of her marriage. The registrar reported in favour of an allowance of 195*l.* per annum (which was about one-third of the husband's income), for the wife for her life, or until she married again. Butt, J., on the application of the wife, struck out the clause "or until she marries again," and granted the allowance during her life absolutely.

The husband appealed.

Finlay, Q.C., and *H. Stokes,* for the husband. The learned judge proceeded on the general principle that where a marriage is dissolved through the misconduct of the husband it is right that the allowance to the wife shall be continued during her whole life. But the Court has never acted upon such a principle; on the contrary, the ordinary practice has been to insert in the order the words "so long as she remains unmarried": *Fisher* v. *Fisher* (1); *Chetwynd* v. *Chetwynd* (2); *Sidney* v.

(1) 2 Sw. & Tr. 410. (2) Law Rep. 1 P. & D. 39.

Sidney (1); *Medley* v. *Medley*. (2) The limitation is a very reasonable one, and unless there are some special circumstances in the case it ought always to be inserted. Sect. 32 of 20 & 21 Vict. c. 85, under which the order was made, was intended to give the judge a discretion as to the amount, and not to alter the practice of the Court as to the conditions of payment.

Inderwick, Q.C., and *Searle*, for the wife. There was no fixed rule upon the subject in the House of Lords before the Divorce Acts: but the House always insisted on a proper provision being made for the wife. Under the Divorce Acts the practice has not been uniform. At first the judges inclined to insert the clause dum sola vixerit, but there has been a change in this respect and of late the practice has been to omit it: *Gladstone* v. *Gladstone* (3); *Harrison* v. *Harrison* (4); *Hart* v. *Hart* (5); *Corbett* v. *Corbett*. (6) Sect. 32 of 20 & 21 Vict. c. 85, gives discretion to the judge both as to the amount of the allowance and as to the time during which it is to be paid: and in this case the judge has exercised his discretion, and the Court ought not to interfere with his order.

1889. Nov. 19. COTTON, L.J. This is an appeal by a husband against an order of Butt, J., directing payment of an annual sum by the husband as permanent alimony to his wife who had obtained a divorce. The appeal was brought on the ground that the learned judge had excluded from the order the clause which was for a long time usually introduced into such orders, limiting the allowance to the period during which the wife should remain unmarried. It was said that the learned judge had laid down a general rule that the clause "so long as she remain unmarried" should be left out of the order, and that the allowance should be made to the wife for her life absolutely. If he had laid down any such general rule fixing the practice of the Court, I think that I should have desired to have the case re-argued before the full Court of Appeal. But it appears from the published report of the judgment that Butt, J., did not lay down any such general

(1) 4 Sw. & Tr. 178.
(2) 7 P. D. 122.
(3) 1 P. D. 442.
(4) 12 P. D. 130.
(5) 18 Ch. D. 670.
(6) 13 P. D. 136; 14 P. D. 7.

1889

LISTER v. LISTER.

Cotton, L.J.

rule. He treated it as a matter of absolute discretion, and under the Act of Parliament I think he had such a discretion. The words of s. 32 of the 20 & 21 Vict. c. 85, are these: "The Court may, if it shall think fit, on any such decree order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable." It is a matter entirely within the discretion of the judge. I do not say that it is a discretion the exercise of which cannot be appealed against. I think it can. But in this case I see no reason for differing from the learned judge in the way he has exercised his discretion. He must have known more about the facts of the case and the circumstances of the parties than we can possibly do, and I think it would be wrong to interfere with his discretion. The appeal must be dismissed.

FRY, L.J. The discretion to be exercised by the judge in allowing permanent alimony is a discretion given by the section of the statute referred to by Cotton, L.J. By that section the Court may order the husband to secure to the wife either such gross sum of money or such annual sum of money as, having regard to the circumstances of the case and the conduct of the parties, it shall deem reasonable. It was said that Butt, J., had laid down the doctrine that primâ facie any alimony allowed ought to be for the life of the wife obtaining the divorce. But a reference to his judgment shews that he laid down no such rule. On the other hand it was said that primâ facie the rule ought to be to give the wife the annual sum allowed as alimony only until her second marriage. In my opinion that proposition is equally untenable. The Act empowers the judge to give the wife an annual sum for any period not exceeding her life, or, in the alternative, to give her a gross sum of money, and it could not be said that the enjoyment of the latter could be taken from her on her second marriage. Therefore it must be inferred that the legislature was clearly not unfavourable to the grant of the alimony being for the whole life of an innocent wife. It appears

to me that the effect of the section is to leave an unfettered discretion in the judge in each case, and it would be wrong to lay down any primâ facie rule whether the annual sum should be payable during the wife's whole life or until her second marriage. It is the duty of the judge to exercise his discretion according to the particular circumstances of each case. The only question, therefore, in the present case is whether the learned judge has exercised his discretion in a proper manner. The facts of the case are these:—The wife was married at the age of seventeen; she had no property of her own, but the husband had property producing an income of about 560*l.* a year. The husband turned out to be an intemperate and cruel man and an unfaithful husband, and he made the life of his wife unbearable, drove her from his home, and compelled her to seek the aid of the Divorce Court. That is as great a wrong as it is possible for a man to inflict on his wife. Under these circumstances the judge has allowed her an annuity of 195*l.*, about a third of her husband's income, out of his property, for life. Can it be said that this is an unreasonable compensation to be paid by a man who has violated his marital duties in this manner? I agree that this appeal must be dismissed with costs.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors for the appellant: *Smith, Fawdon, & Low*, agents for *Wright, Williams, & Wright*, Leicester.

Solicitors for the respondent: *Roche & Son.*

M. W.

1889
Oct. 29.

IN THE GOODS OF COVELL.

Administration de bonis non—Administrator absconded—Revocation of Grant—New Grant made.

An administrator, who was also one of the residuary legatees, having partly administered the estate, left his home, and though several years had elapsed no trace of him could be discovered. The Court revoked the grant made to him, and made a fresh grant de bonis non to another of the residuary legatees.

SAMUEL COVELL died September 1, 1875, leaving a will duly executed bearing date May 23, 1873, by which he bequeathed his residuary estate to trustees in trust for his four grandchildren. Probate of the will was granted to the son of deceased, Samuel Henry Covell, who died, having partly administered the estate, leaving a will by which he appointed his wife his sole executrix. She predeceased him, and on March 17, 1880, a grant de bonis non of the estate of Samuel Covell was made to Samuel Henry Smyth Covell, a grandson and one of the residuary legatees. He administered the whole of the estate, with the exception of a sum of 1084*l.*, due to it from one James Pendleton, and on December 9, 1884, he left his home, and had never since been heard of. In a letter addressed to his sister, taking leave of her, he wrote: "This is the last time you will ever see or hear of me. Very likely my body will be found at the bottom of the river. Money matters have driven me to it." It was also stated that once before his departure he had endeavoured to commit suicide.

B. Deane moved that the grant of administration to Samuel Henry Smyth Covell be revoked, and a fresh grant de non bonis be made to Mrs. Irene Welsh, a granddaughter and one of the residuary legatees of the testator. He relied on *In the Goods of Bradshaw* (1); *In the Goods of Jenkins* (2); and *In the Goods of Hoare.* (3)

BUTT, J. Apart from these precedents I might not have been able to see my way very clearly, but I think they are sufficient,

(1) 13 P. D. 18. (2) 3 Phill. Ecc. 33.
(3) 2 Sw. & Tr. 361, n.

and I direct the grant to Samuel Henry Smyth Covell to be revoked, and a fresh grant de bonis non to be issued to Mrs. Welsh as prayed.

[On November 12 a similar grant to the estate of Samuel Henry Covell was made to Mrs. Welsh on the same grounds.]

Solicitors: *F. Venn & Co.*

W. L.

IN THE GOODS OF MORRIS.

Nov. 19.

Administration—Grant to Committee of Lunatic—Sureties to Administration Bond.

The committee of a lunatic having applied for a grant of administration for her use and benefit, it appeared that the estate to be administered consisted of 12,000*l.*, of which all but 850*l.* had been paid into the Chancery Division, and the balance would shortly be paid in:—

Held, that sureties for the administration bond could not be dispensed with, but that it would be enough if the sureties entered into a bond for double the value of the estate after deducting the amount paid into the Chancery Division.

MRS. ANNE MORRIS died March, 1869, and in the April following Miss Morris, her daughter, took out letters of administration to her estate. In November, 1872, Miss Morris became a lunatic, and was so found by inquisition, Mr. Banner being appointed the committee of her estate.

The estate to be administered was of the value of 12,000*l.*, of which 11,150*l.* had been paid into the Chancery Division. The rest consisted of 850*l.* due on a mortgage, which was about to be paid in, and it became necessary that a grant should be made for the use and benefit of the lunatic. The committee applied for the grant, and

Middleton, for the committee, moved that sureties to the administration bond might be dispensed with. The committee has given security for the greater part of the estate, which is in the Chancery Division—and the whole fund will be administered there.

[BUTT, J. I see no reason for departing from the usual course of requiring sureties.]

1889

IN THE GOODS OF MORRIS.

Would it be sufficient if the sureties gave a bond for twice the amount of the balance outstanding, viz., for 1700*l.*?

BUTT, J. I have no objection to that being done, but the administrator, of course, will have to give a bond for the whole amount.

Solicitor: *Chester.*

W. L.

Nov. 19.

IN THE GOODS OF AMELIA CLARK.

Administration—Presumption of Death—Person alleged to be deceased not the Person whose Estate was to be administered.

Upon application by the next of kin of a married woman for a grant of administration to her estate, the Court was asked to allow an affidavit to be made of the death of her husband, on the ground that his death might be presumed from the lapse of time since he was last heard of:—

Held, that having regard to the fact that the person whose death was to be presumed was not the intestate, such leave should not be given, but that administration might be granted if the applicant was prepared to make an affidavit that the intestate had died a widow.

AMELIA CLARK, late of Leeds, in the county of York, died March 14, 1889, intestate, leaving property consisting of a 200*l.* bond of the Wakefield Corporation and 19*l.* in a building society.

On November 12, 1863, the deceased was married in Demerara to John Marshall Clark, a civil engineer, and they lived together at various places in the West and East Indies and in England until January, 1870, when John Marshall Clark went to Chili to seek employment on the understanding that if he were successful his wife should go out to him. Letters were received from him until July, 1873, when they suddenly ceased, and though inquiries had been made nothing had since been heard of him.

Marie Hannah Jackson, spinster, the sister of the intestate, applied for a grant of letters of administration to her estate.

B. Deane, for the applicant, moved for leave to swear the death of the husband of the intestate as having occurred on or since July, 1873.

BUTT, J. It is very unusual to give leave to presume the death of some person other than the person whose estate is to be administered. I have never done it myself, and I am not aware that it has ever been done. If the applicant is prepared to swear that her sister died a widow the grant will go as a matter of course.

Solicitors: *Smiles, Binyon, & Ollard.*

W. L.

SMITH *v.* SMITH.

Oct. 25.

Restitution of Conjugal Rights—Written Demand—Additional Rules and Regulations, 1875, *r.* 175—*Practice.*

In a petition by the wife for restitution of conjugal rights it appeared that after eleven years' separation, and before filing the petition, she addressed a letter to her husband formally demanding a return to cohabitation, and threatening to commence legal proceedings in the event of a refusal:—

Held (following *Field* v. *Field* (14 P. D. 26)), that this was not a proper demand within the meaning of rule 175 of the Additional Rules and Regulations 1875.

THIS was a wife's petition for the restitution of conjugal rights.

Searle, for the petitioner.

The respondent did not appear, and had not filed an answer.

The parties were married in 1866 and cohabited together until 1877, since which time they had lived apart. It appeared that in 1888 the petitioner became aware that the respondent had committed adultery, and thereupon gave instructions to commence this suit. On October 8, 1888, the following letter under rule 175, written by her solicitors but signed by the petitioner, was addressed to the respondent and served on him by the petitioner:—

"I, Mary Elizabeth Smith, hereby give notice to you, Charles Frederick Smith, my husband, of my desire to cohabit and live with you, and I demand from you a full restitution of the conjugal rights of which you have deprived me; and I further notify to you that in the event of your not receiving me and providing a suitable home and habitation for me, it is my intention to

1889

SMITH v. SMITH.

apply to the High Court of Justice for the restitution of such my conjugal rights."

The reply from the respondent was in the following terms:—"I am duly in receipt of yours, and in reply I beg to state that I decline to receive back my wife or to make any home for her."

[BUTT, J. How can you reconcile that letter with the interpretation put on rule 175 by the Court of Appeal in *Field* v. *Field* (1)? where it was held that the letter requiring a restitution of conjugal rights "ought to be a conciliatory letter, such as would be likely to lead to a friendly reconciliation between husband and wife,"—not simply a solicitor's letter threatening the husband with legal proceedings—"a conciliatory letter and not a challenge."]

Searle, for the petitioner. In *Field* v. *Field* (1) there does not seem to have been any answer, but here there is an answer refusing to return to cohabitation.

[BUTT, J. I cannot see that that makes any difference.]

The Court of Appeal may have had in its mind the case of persons who had just separated, perhaps from a passing quarrel, and where it might be said the wife was bound to do her best to remove any cause of disagreement. But where man and wife have been living apart, as in this case, for eleven years, and where there is evidently no intention on the part of the husband to return to cohabitation, a mere formal demand should be all that is necessary. The gist of the case is the husband's refusal, which shews that he has no intention to take his wife back, and that entitles her to a remedy.

BUTT, J. By rule 175 it is provided that the petitioner shall satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld. In this case it is proved that on October 8, 1888, a written demand was made by the petitioner on her husband for a restitution of conjugal rights, and the question is whether that is a sufficient demand. It is not neces-

(1) 14 P. D. 30, 31.

sary for me to consider what interpretation I should put on the words of the rule 175 if I had to decide the matter in the first instance. I am not called on to do so, because the interpretation of that rule has already been a matter of judicial decision, and the Court of Appeal has considered and pronounced judgment upon it. Without for a moment intimating a doubt as to the correctness of that judgment, I have only to say that I must follow it. What the Court of Appeal has said is that it is a mistake to suppose that the words of the rule enjoin merely a notice to return to cohabitation. They have said that the notice must be a conciliatory notice, and that the spirit of the rule is contravened if it is merely a notice served on the party for restitution accompanied by a threat of proceedings in case restitution of conjugal rights is refused. It is such a form of notice accompanied by such a threat which has been given in this case; and that being so, I am bound to hold, as I do hold, that it is not a proper demand under rule 175, and that it is not a demand likely to lead to an amelioration of the state of things between husband and wife. I must, therefore, refuse the decree.

Solicitors: *Wontner & Sons.*

W. L.

BUTLER *v.* BUTLER.
BUTLER *v.* BUTLER AND BURNHAM.

Nov. 19, 26.

Divorce—Cross-petitions—Alimony pendente Lite—Order for continuation of Alimony after two Trials in neither of which had a Verdict of Adultery been returned against the Wife—Fi. fa. refused.

On the trial of cross petitions presented by husband and wife, the jury found that the husband had, but the wife had not committed adultery, and a decree nisi for dissolution of the marriage was accordingly pronounced by the Court. The Queen's Proctor having intervened, a second trial took place, when the jury found that both parties had acted in collusion to suppress material facts, but they could not agree as to the charge of adultery, brought by the Queen's Proctor against the wife. The Court rescinded the decree nisi. The wife appealed, and the husband had ceased to pay the alimony:—

Held, that a writ of fi. fa. to enforce the arrears of alimony could not be granted, but that the order for payment of the alimony ought to be renewed until further notice.

MOTION for the issue of a writ of fi. fa. to enforce payment of arrears of alimony.

1889

BUTLER v. BUTLER. BUTLER v. BUTLER AND BURNHAM.

In this case there were cross-petitions of the husband and wife, and there had been two trials. At the first trial, on the second day, a compromise was agreed to by which a verdict was taken against the husband and in favour of the wife, acquitting her of adultery, and a decree nisi was pronounced. The Queen's Proctor then intervened, and charged both parties with collusion and the suppression of material facts, and he further alleged that the wife had been guilty of adultery. In this second trial the jury found that the husband and wife had acted in collusion to keep back material facts from the knowledge of the Court, but they could not agree that the wife had committed adultery. The Court thereupon rescinded the decree nisi, against which the wife had appealed.

The husband had ceased to pay alimony since the month of August, and the registrar, on the application of the wife, refused to grant a writ of fi. fa. to enforce payment.

B. Deane, for the wife, appealed against this refusal. No verdict of adultery has been pronounced against the wife, and the order for alimony is therefore a continuing order. If the order is not a continuing order the Court may make an order continuing it until the final decree. [He cited *Loveden* v. *Loveden* (1), *Wells* v. *Wells* (2), *Jones* v. *Jones* (3), and *Dunn* v. *Dunn*. (4)]

BUTT, J. I do not think this is a case for a fi. fa., though I think it is within the discretion of the Court to make an order continuing the alimony, as there has been no finding of adultery against the wife. But I do not think I ought to do anything in the absence of the husband, and the motion must be postponed in order that he may have notice.

Nov. 26. The husband appeared in person, and was heard against the motion to continue the alimony.

B. Deane, in reply.

BUTT, J. I regret to have to make the order which I think must be made in this case, that is, that the order for payment

(1) Phill. 208.
(2) 3 Sw. & Tr. 542.
(3) Law Rep. 2 P. & D. 333.
(4) 13 P. D. 91.

of alimony to the wife should be continued until the appeal. I regret it, because my opinion of the wife's conduct was a very strong and pronounced one, and I was surprised that the jury could come to no conclusion upon it. However, the fact remains that at the first trial the jury, acting, as now appears, under the influence of the collusion between husband and wife, found the wife not guilty of adultery. On the second trial the jury being summoned, among other things to decide whether she had committed adultery, disagreed upon that point. As they are the judges of the matter of fact, and not I, I am bound to take it that there has been no verdict of adultery against the wife. I am not entitled to allow any feeling of my own to prevail, and that being so, I think I am bound to continue the alimony, and I do continue it until further order.

Solicitors for the wife: *Clinton & Buckley*; Mr. Butler in person.

W. L.

[IN THE COURT OF APPEAL.]

Dec. 9, 10.

THE CITY OF LINCOLN.

Collision—Damages, Measure of—Loss of Equipment for Navigation.

A collision took place between a steamer and a barque, the steamer being alone to blame. The steering compass, charts, log and log glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass which he found on board. The barque while on her way, without any negligence on the part of the captain or crew, and owing to the loss of the requisites for navigation above mentioned, grounded, and was necessarily abandoned:—

Held, by the Court of Appeal, that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby.

APPEAL from a judgment of Butt, J., reversing the registrar's report.

The facts were shortly as follows. On November, 7, 1888, the barque *Albatross* was run into by the steamer *City of Lincoln* in the North Sea, about twelve miles north of North Hinder Light. The starboard quarter of the barque was cut off, and thereby the steering compass, the log and log glass, and the large chart

1889

THE CITY OF LINCOLN.

and the coasting chart were lost. Though she was difficult to navigate in consequence of the collision, the master of the *Albatross* made for the Thames, steering by another compass in a box which he found in the hold. In consequence of the loss of the log he was unable to calculate the distance he ran. A lightship was subsequently discerned, which those on the barque supposed to be the Kentish Knock Lightship, and thereupon, after sounding, her course was altered to the north. She, however, almost immediately afterwards grounded, and was in consequence necessarily abandoned. The registrar held that as the grounding of the barque was not caused by any negligence or want of care of those on board of her, the defendants, the owners of the *City of Lincoln*, were liable for the damages sustained by the owners of the *Albatross*. Butt, J., reversed this report on the ground that there had been negligence on the part of those in charge of the *Albatross*.

Barnes, Q.C. (*Stubbs*, and *Stokes*, with him), for the plaintiffs. The decision of the registrar was right. There was no negligence on the part of those in charge of the *Albatross*. Her loss was caused by the wrongful act of the defendants, it was a consequence of this wrongful act without the intervention of anything further.

[They referred to *Jones* v. *Boyce* (1); *Wilson* v. *Newport Dock Co.* (2); *The Pensher* (3); *The Countess of Durham* (4); *The Notting Hill* (5); *The Argentino* (6); *The Mellona.* (7)]

Sir W. Phillimore, and *Aspinall*, for the defendants. The loss of the *Albatross* was not a direct consequence of the collision, the damages arising from it are too remote. The intervention of the act of man after time for deliberation breaks the chain of consequences.

[They referred to *The Flying Fish* (8); *Adams* v. *Lancashire and Yorkshire Ry. Co.* (9)]

Barnes, Q.C., in reply.

(1) 1 Stark. 493.
(2) Law Rep. 1 Ex. 177.
(3) Swa. 211.
(4) 9 Monthly Law Magazine, 357.
(5) 9 P. D. 105.
(6) 14 App. Cas. 519.
(7) 3 Wm. Rob. 7.
(8) Br. & L. 436.
(9) Law Rep. 4 C. P. 739.

LORD ESHER, M.R. In this case the bad navigation of the *City of Lincoln* did not merely damage the *Albatross*, it had this further effect, it deprived the captain of the latter ship of his best chart and best compass and also of his log line. After he had lost these things, it was very difficult for him to know where he was, but he properly resolved to make for the Thames. He had however to do so not knowing, owing to the above circumstances, exactly the point from which he was setting his course, unable to mark it off in a proper chart, and without the means of calculating the speed of his vessel. We are advised that he was not guilty of negligence in not knowing what the light was which he saw subsequently or in anything which he did. But the fact that the master was not negligent is not enough to decide this case, for there may be intermediate circumstances in a case which prevent the ultimate damage from being the direct result of the defendants' act. But in the present case I am of opinion that the ultimate loss of the ship was caused by the captain being deprived of the means of finding out where his ship was, which deprivation was the direct result of the wrongful act of the defendants. If the defendants have done a wrongful act, whereby the plaintiffs or their servants have been deprived of the means of averting an accident which subsequently happens, the defendants are responsible for it and such accident—as in the present case—is not too remote. This appeal must, therefore, be allowed.

LINDLEY, L.J. I am of the same opinion. I think that the view of the facts taken by the registrar was correct. We are advised that there was nothing negligent or unseamanlike in the conduct of the master of the *Albatross*, and therefore we cannot hold that it was his negligence or want of seamanship which led to the ultimate loss of this vessel; in this respect we differ from the decision of the Court below. But this does not dispose of the case, for the question then arises whether the loss of the ship was not too remote a consequence of the collision to render the owners of the *City of Lincoln* responsible for the loss of the *Albatross*. That depends on the application to this particular case of the general rule applicable to damages. I have always

1889

THE CITY OF LINCOLN.

Lindley, L.J.

understood that rule to be as laid down in Mayne on Damages. It is there stated that "Damage is said to be remote, when although arising out of the cause of action, it does not so immediately and necessarily follow from it as that the offending party can be made responsible for it." (1) Further on occurs this passage, "The first and in fact the only inquiry in all these cases is whether the damage complained of is the natural and reasonable result of the defendants' act: it will assume this character, if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act." (2) That is a general way of stating the rule, which was applied by Lord Herschell in the case of the *Argentino*. (3) We have then to consider what is the meaning of "the ordinary course of things." Sir Walter Phillimore has asked us to exclude from it all human conduct. I can do nothing of the kind. I take it that reasonable human conduct is part of the ordinary course of things. So far as I can see my way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss. That principle was acted on in *Jones* v. *Boyce* (4), which I have always regarded as sound law. Let us see, then, what occurred in the present case, and what was the real cause of the loss of this vessel. It was the fact that the captain was, by the collision, deprived of the means of ascertaining his position and of properly navigating his ship. He was deprived of his compass, his log-line, and his charts. His ship was not utterly unmanageable but she was in a very bad state, and the necessary consequence of all this was that this captain lost his vessel without any negligence on his part. Under these circumstances the case falls within the rule I have laid down as to the term "ordinary course of things." Therefore, I am of opinion that the owners of the *City of Lincoln* must pay for the loss of the *Albatross*.

LOPES, L.J. We have been advised that, having regard to the condition of the *Albatross* at the time, her ultimate loss was

(1) 4th Ed. p. 44.
(2) 4th Ed. p. 45.
(3) 14 App. Cas. 519.
(4) 1 Stark. 493.

not caused by want of proper skill and care on the part of those on board of her. That being so, it appears to me that the case may be stated thus. By the misconduct of the defendants the plaintiffs' ship was placed in a position of the utmost peril, this being originally entirely caused by the fault of the defendants. The plaintiffs, to save their ship, and minimise so far as possible the loss to the defendants, endeavoured to reach a place of safety. While so endeavouring, without any negligence on the part of those on board her, or any want of skill—because, having regard to the advice we have received, I am entitled to state that—and also without any intervening independent moving cause, the *Albatross* runs ashore. In these circumstances, are the defendants liable for what happened to the *Albatross* subsequently to the collision? In my opinion they are. The original fault being the defendants'—I mean by that the collision—they are responsible for what follows. They are responsible for all the natural consequences occasioned by their original misconduct, and when I say original misconduct I do not mean only the collision, but the deprivation of the *Albatross* of the usual means of navigation. I have stated that they are responsible for the natural consequence of that original misconduct. But if that consequence were caused by any want of skill on the part of the *Albatross*, the liability would not attach. Again, if the consequence had been caused by anything which those on board the *Albatross*, by the exercise of proper skill and care, could have prevented clearly that liability would not attach. But here, as I have said, we have been advised that there was no want of skill on the part of those on board the *Albatross*. It is not suggested that there was any interposition or independent act of a third party, or that there was anything done by those on board the *Albatross* which constituted a want of proper skill or care. Under those circumstances I am clearly of opinion that what happened to the *Albatross* subsequent to the collision was the result of the original fault of the defendants, and by that I mean not only the original fault of the collision, but the fact that by the collision the plaintiffs were deprived of all those instruments of navigation which are necessary for the purpose of properly navigating a ship. I

1889

THE CITY OF LINCOLN.

think, therefore, the decision of the learned judge should be reversed.

Appeal allowed.

Solicitors for plaintiffs: *Stokes, Saunders & Stokes.*
Solicitors for defendants: *Rowcliffes, Rawle & Co.*

E. S. R.

Nov. 13.

MILLS *v.* MILLWARD AND ANOTHER.

Will—Revocation—Destruction without Authority of Testator—Subsequent Ratification—Wills Act (1 *Vict. c.* 26), *s.* 20.

The will of a testatrix was destroyed in her presence, but without her consent or authority, by a relative. Subsequently the testatrix, though pressed to do so, refused to make a new will, saying that she could not bring her mind to it, and that it must remain as it was:—

Held, that there was no sufficient evidence of a subsequent ratification of the destruction of the will so as to constitute it an act done by the direction and by the authority of the testatrix, and that probate might be granted of the will as contained in an affidavit of the executor.

Quære, whether, where a will has been destroyed not only without the authority of a testatrix, but against her wish, any subsequent ratification of the act of destruction will make it a revocation within s. 20 of the Wills Act.

CHARLES MILLS, the plaintiff, propounded as sole executor the last will and testament of Mary Stacey, as contained in an affidavit of its contents, and the defendant, John Millward, by his guardian ad litem opposed probate, on the ground that the will had been revoked by the testatrix.

The case was heard before Butt, J., without a jury.

It appeared that the testatrix duly executed her will February 12, 1888, and by it disposed of her whole estate, amounting to something over 400*l.*, in small specific legacies to various relations. The will remained after execution in the custody of the testatrix, who shortly before her death gave it to one Mrs. Eliza Millward, her sister-in-law, to read. Mrs. Millward, finding that neither her name nor that of her husband appeared in it, lost her temper, tore it up and threw the fragments into the fire in the presence of the testatrix, telling her at the same time that unless

she made a new will her property would go to her brother and not as she wished it.

Subsequently Mrs. Millward obtained the forgiveness of testatrix and urged her to make another will, but the testatrix replied, "No, I shall never make another will, let it remain as it is." On a later occasion a friend of the testatrix, Mrs. Simmons, in conversation as to the destruction of the will, pointed out that it was not too late to make another; but to this the testatrix answered, "I shall not make another, I never could bring my mind to it." The testatrix died a few days after without making another will.

B. Deane, for the defendant. The language used by the testatrix to Mrs. Millward and Mrs. Simmons amounted to a ratification of the destruction of the will, and was therefore equivalent to a destruction of the will by the deceased in her presence and by her direction with the intention of revoking it.

Inderwick, Q.C. (*Searle*, with him). The words used by the testatrix were not equivalent to a revocation, and a ratification subsequent to destruction could not satisfy the requirements of the 20th section of the Wills Act defining revocation: "Burning, tearing, or otherwise destroying the will by the testator or by some person in his presence and by his direction with the intention of revoking." Here the destruction was not by the testatrix, and it is not pretended that it was done by her direction.

BUTT, J. The question here arises under s. 20 of the Wills Act. In order to establish revocation it is contended on behalf of the defendant that though Mrs. Millward had no authority to destroy the will, and was in fact acting diametrically against the wish of the testatrix in destroying it, yet as the testatrix afterwards expressed her satisfaction with the state of things which had been brought about by the destruction, that amounts to a ratification of what Mrs. Millward had done, and that such ratification was tantamount to a destruction by the testatrix and by her authority. I doubt very much whether that is a tenable argument in any circumstances, but it is not necessary for me to decide the point, as I hold that the words attributed to the testatrix do not amount to a ratification of the destruction by Mrs. Millward.

1889

MILLS v. MILLWARD.

Probate will therefore go of the will as propounded in the affidavit of the executor, and all parties will have their costs out of the estate.

Solicitors for plaintiff: *Gush, Phillips, Walters & Williams.*
Solicitors for defendants: *Hickin & Fox.*

W. L.

Dec. 10.

IN THE GOODS OF THE EARL OF LEVEN AND MELVILLE.

Will—Executors according to the Tenor.

A testator in his will did not specifically appoint any executor but nominated four persons to act as his trustees, and bequeathed to them his residuary estate with power to receive any sums due to the residue, and to give a discharge for the same. The will contained directions to "my executors" as to the payment of his debts and as to the manner in which they were to deal with the residue and other portions of the estate; and generally it appeared that the testator had used the terms "trustees" and "executors" indifferently as referring to the same persons:—

Held, that the trustees were executors according to the tenor, and entitled to probate.

APPLICATION for probate.

Alexander Leslie Melville, Earl of Leven and Melville, died October 22, 1889, leaving a will, dated February 1, 1879, and two codicils, dated respectively January 5, 1882, and February 5, 1885. The will and codicils were drawn by the testator himself, and were found in an envelope after his death, on which was written in the testator's handwriting:

"Will of Alexander Earl of Leven and Melville, Feb. 1879.

W. S. Deacon,
R. Williams, junr.,
H. S. Northcote,
W. Godden, } Executors."

In the first paragraph of the will the testator directed his executors "hereinafter named" to pay his debts, personal and testamentary expenses, but in no part of the will did he name any persons specifically to act as his executors. In the second paragraph he devised all his trust and mortgage estates in trust to William Samuel Deacon, Robert Williams, jun., Sir Henry Stafford

Northcote, and William Godden. In clause 6 of the will giving directions as to a sum of 40,000*l.*, alleged to be due by the present Earl, the will said, "and I trust him to repay to my executors for my residuary estate," the residue being afterwards bequeathed to the four persons named upon trust, with power to them to receive any sums due to the residue, and to give a discharge for the same. In his second codicil the testator directed that the receipt of the trustees of a certain marriage settlement "shall be a full discharge to my executors;" and he further authorized "my executors" to deposit a sum of 20,000*l.* for the benefit of one of his nephews. The registrars had refused to grant probate of the will to the four persons named as trustees.

Searle, moved for a grant to them as executors according to the tenor. The language of the will shews that the testator intended them to act as his executors, and he has referred to them as his trustees and his executors indifferently.

BUTT, J. This is an application to grant probate to four gentlemen alleged to be executors. They are not expressly appointed executors by the words of the will, but it is said that it ought to be inferred that they are executors from the language of the will, and especially of the second codicil, which shews, it is said, that it was intended to appoint them executors. In other words, I am asked to make a grant to them according to the tenor. I have a great objection to granting probate to people who are not expressly designated executors of the will, and who merely claim to be executors according to the tenor; because such a grant confers on them the right to administer not only the estate of the maker of the will, but also all other estates in reference to which the testator stood in a representative capacity. It is a serious thing, and it ought not to be done except in cases where it is quite clear that it was the intention of the testator to cast on the person the duties of an executor. I do not think it necessary that I should go through the whole of this document, but it is abundantly clear not only that this testator intended that the four gentlemen he has named as trustees should be executors, but that he really thought from the time of making the

1889

IN THE GOODS OF EARL OF LEVEN AND MALVILLE.

will in 1875 down to the making of the second codicil in 1885 that he had actually made them his executors. Under the circumstances, therefore, I grant probate to those gentlemen as executors according to the tenor.

Solicitors: *Godden, Holmes, & Co.*

W. L.

Dec. 10.

TRUBNER *v.* TRUBNER AND CRISTIANI.

Divorce—Practice—Service of Citation—Registered Letter.

In a petition for divorce it appeared that the respondent and co-respondent were residing together abroad, and that by the law of the place where they resided the co-respondent, a foreigner, had a right of action against any person serving him with English process:—

Held, that the citation might be served on the co-respondent by inclosing it in a registered letter addressed to him, another copy being sent to the respondent so as to make it more probable that it would come to his knowledge.

MOTION for leave to dispense with personal service of citation.

The suit was for dissolution at the instance of the husband on the ground of the wife's adultery with the co-respondent. The respondent and co-respondent were living together at Geneva, and the citation had been served on the respondent there, but the agent of the petitioner's solicitor had informed him that the co-respondent, being an Austrian subject, would, according to Swiss law, have a right of action if served with any foreign process of law.

Dove, for the petitioner, moved to dispense with personal service.

BUTT, J. Under the circumstances I will allow you to serve the citation by inclosing it in a registered letter addressed to the co-respondent, and as the respondent is living in the same house with him, you may send another copy to her, so that it is pretty sure to come to his knowledge.

Solicitor: *John Greenfield.*

W. L.

FRY *v.* FRY.

1889
Dec. 10.

Nullity—Alleged Insanity of Petitioner—Guardian—Order under rule 196, *Additional Rules and Regulations—Practice.*

An order ought not to be made under rule 196 assigning a guardian ad litem to a person alleged to be of unsound mind where there is a substantial dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian.

MOTION to rescind an order made under rule 196.

George Fry and Elizabeth S. Gordon Fry, formerly Routh, were married on June 25, 1889, and on November 13, 1889, Edward Stanley Routh, son of Mrs. Fry, obtained in the registry an order under rule 196 assigning him to be his mother's guardian for the purpose of promoting a suit declaring her marriage with Mr. Fry to be null and void on the ground that at the time she went through the ceremony she was of unsound mind and incapable of entering into any such contract.

Middleton, on behalf of Mrs. Fry, moved (in chambers) to rescind the order and read affidavits from Mrs. Fry and Mr. Fry, from Mrs. Fry's solicitor, and from six medical men denying the allegation of incapacity and unsoundness of mind.

Searle, in support of the order.

BUTT, J. I do not think that such an order as this should be made where there is a bonâ fide and substantial dispute as to the insanity of a party, and I therefore discharge it.

Order rescinded.

Solicitors for the wife: *Irvine, Hodge & Borrowman.*
Solicitors for the husband: *Fry & Hudson.*
Solicitors for the guardian: *Wontner & Sons.*

W. L.

1889
Dec. 17.

THEOBALD *v.* THEOBALD.

Restitution of Conjugal Rights—Refusal of Husband to comply with Decree—Periodical Payments—Proportion of Husband's Income payable to the Wife—Deductions from Husband's Income on account of Losses in Business—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 2.

By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), the Court may, after a decree for restitution of conjugal rights upon the application of the wife, order that in the event of such decree not being complied with the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation.

Where a husband had not complied with a decree of restitution of conjugal rights obtained by the wife within the time named in the decree, the Court ordered that he should secure to her for their joint lives a "periodical payment" equal to one-third of their joint incomes.

In estimating the amount of the husband's average income the Court refused to allow a deduction in respect of losses sustained by him during the previous three years in a branch of his business which had been closed.

MOTION to vary the report of the registrar upon the allowance to be made to the wife who had obtained a decree for restitution of conjugal rights.

It appeared that the decree for restitution of conjugal rights had been served personally on the husband, and he had refused to comply with it. On the wife's application for permanent maintenance under 47 & 48 Vict. c. 68, s. 2, the registrar reported that the respondent should secure to the petitioner during the joint lives of the parties the sum of 195*l.* per annum, being one-third of their joint income. The respondent was a wine merchant, and in 1884 he had opened a supplementary business the loss on which during the four years of its existence had amounted to 1700*l.* The registrar in settling the amount of the respondent's income held that this loss of 1700*l.* should be distributed over the four years, by which his income was reduced from 1300*l.* to 900*l.* a year.

Inderwick, Q.C. (*B. Deane,* with him), for the petitioner. The registrar ought not to have taken into account the loss of 1700*l.*, which was only temporary and had come to an end, so that the respondent's income was not affected by it.

Bayford, Q.C. (*Crosse*, with him), for the respondent. The registrar followed the ordinary course in making allowance for a loss which diminished the husband's means of paying alimony. But the registrar was wrong in ordering the husband to secure a permanent provision for the wife during their joint lives amounting to one-third of his income. The point has never arisen before; but it is clear that a wife who has merely obtained an order for restitution of conjugal rights ought not to be placed in a better position than if she obtained a decree of judicial separation, in which case she would only be entitled to ordinary alimony. The power given by s. 2 of the Matrimonial Causes Act, 1884, is to order the husband to make periodical payments which are to be enforced in the same way as orders for alimony in a suit for judicial separation; but the Act does not contemplate a permanent provision being made for the wife whose husband has not obeyed a decree for restitution of conjugal rights to the amount of one-third of his income. It is a payment in the nature of alimony pendente lite. There is no power to compel a husband to secure after his death a payment for the rest of her life to a wife with whom he has refused to live.

Inderwick, Q.C., in reply. The Court has clearly power to compel the husband to secure to his wife the periodical payments which it thinks should be made to her, and it is in the husband's power to put an end to it by returning to cohabitation.

BUTT, J. I am of opinion that the report ought to go back to the registrar for the amendment of the figures. I think that it is wrong in calculating a man's average yearly income to allow for a loss sustained during three years on a business which has now come to an end. With reference to the next question, I cannot agree with the view suggested by Mr. Bayford. The 2nd section of 47 & 48 Vict. c. 68, authorizes the Court where a husband has not complied with a decree for restitution of conjugal rights to order him to make such periodical payments to the wife as the Court may think fit, and also to order him to secure those payments. It is said, however, that the Court ought not to make an order for these periodical payments to the extent of

1889

THEOBALD v. THEOBALD.

Butt, J.

one-third of the husband's income, and that to order them to be secured as a permanent provision would be putting the wife in a better position than if she had obtained a decree of judicial separation. It is argued that it cannot have been the intention of the legislature that the wife should get more than if she had obtained a decree of judicial separation; but I am by no means inclined to agree with that view of the matter. I think the wife is entitled to take one of two courses. She may if she chooses institute a suit for judicial separation, in which case she would get alimony, but it would be unsecured; or she may rest content with her decree for restitution of conjugal rights and apply to the Court for the periodical allowance contemplated by the Act and have that periodical allowance secured. I do not see anything unreasonable in giving her that option. I do not see why the wife should have a less share of her husband's income if she is content with a decree for restitution of conjugal rights, nor do I think it unreasonable that that should be secured to her; I agree with the view which was taken by the registrar in that respect. As to the further question, whether the payments should be for the wife's lifetime or for the joint lives of husband and wife, I think they ought to be secured for their joint lives.

Solicitors for petitioner: *Clarke & Calkin.*
Solicitors for respondent: *Crosse & Sons.*

W. L.

BENYON *v.* BENYON AND O'CALLAGHAN.

1890
Jan. 14.

*Divorce—Settlements—Order for Variation—Refusal to make further Variation —Subsequent circumstances—*22 & 23 *Vict. c.* 61, *s.* 5.

A decree absolute for a divorce having been pronounced on the husband's petition, an order was subsequently made varying the marriage settlements, and directing the wife to pay to the husband 300*l.* a year. Some years afterwards application was made by the wife to reduce the amount of the payment to 150*l.* a year, on the ground that in consequence of the depreciation of securities her income was materially reduced:—

Held, following *Gladstone* v. *Gladstone* (1 P. D. 440), that the application could not be entertained.

APPLICATION for a further variation of settlements.

The original petition was by the husband for a divorce on the ground of his wife's adultery with Mr. O'Callaghan, and a decree absolute was pronounced on August 4, 1874. (1) A petition was presented for variation of the settlements on the marriage. The petitioner had brought into settlement an income of 300*l.* a year, and the respondent an income of 1350*l.*, and on July 6, 1876, the registrar made an order that the respondent should pay to the petitioner 300*l.* a year, and in addition 200*l.* a year for the maintenance and education of a son, the only child of the marriage. The respondent subsequently married Mr. O'Callaghan, but he had since died. The residue of the settled income left to the respondent amounted when the order was made to 708*l.*, and it appeared that in consequence of the depreciation of foreign securities and the conversion of Consols her income had fallen to 490*l.* a year or thereabouts.

Inderwick, Q.C. (*Gregory*, with him), moved to vary the order further by reducing the annual sum payable to the petitioner to 150*l.* The Court has power under s. 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), to vary its orders whenever necessary, and the use of the word "orders" proves that more than one order may be made. The interest of the parties is the principal consideration for the Court, and the power may be exercised from

(1) 1 P. D. 447.

1890

BENYON v. BENYON AND O'CALLAGHAN.

time to time as the necessity arises. [They referred to *March* v. *March and Palumbo* (1) and *Gladstone* v. *Gladstone*. (2)]

Bayford, Q.C. (*Searle*, with him). The Court has no power to vary an order once made. It is intended that these arrangements shall be final, and an order once made is in the nature of a marketable asset.

[BUTT, J. Suppose the respondent's income had been reduced to the 300*l.* which she had to pay to the petitioner, could she not have applied to vary the order ?]

The Court would have had no power to alter it. *March* v. *March and Palumbo* (1) only goes to this, that orders may be made for the benefit both of the parents and the children, and there must be cases in which there are both ante-nuptial and post-nuptial settlements, as to which separate orders might be necessary. *Gladstone* v. *Gladstone* (2) is an authority for not interfering with an order in consequence of anything which has happened since it was made.

[BUTT, J. Has there been a decision under s. 32 to the effect that where the Court has ordered security to be given and it has been given, the order may be altered ?]

If a deed had been executed it could not have been varied, and the liability of the trustees could not have been affected by an order such as is now applied for. In *Cavendish* v. *Cavendish and Rochefoucauld* (3) the Court reconsidered the order it made because it turned out that it did not express the meaning of the Court correctly. There must have been many cases in which it was desirable that variations should be made in the original order, and the fact that it has never been done shows that the Court did not think it had the power.

BUTT, J. In this suit, which was one for dissolution of marriage brought some years ago, a decree was pronounced in favour of the husband on account of his wife's adultery, and the Court subsequently made an order under the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61, s. 5), by which the wife, who had a considerably larger settled income than that possessed by the

(1) Law Rep. 1 P. & D. 440. (2) 1 P. D. 442.
(3) 38 L. J. (P. & M.) 13.

husband, was ordered to pay to him a sum of 300*l.* during her life out of the settled property. There was also a further provision for the benefit of the only child of the marriage, to which I need not further advert. As I gather, that income has been paid up to the present time; but the respondent, who married the co-respondent now dead, comes to the Court and asks it to vary the order made in 1876 by reducing the annual payment which the husband has to receive. It appears that the securities brought originally into settlement have greatly depreciated in value without any default of the wife's, and her counsel maintains that that is a good and sufficient reason why the allowance ordered in 1876 should be reduced. The first question which arises is, have I the power to make any further orders with reference to this marriage settlement? It is contended by Mr. Bayford that s. 5 of the Matrimonial Causes Act, 1859, contemplated dealing with these marriage settlements once and for all, and that, whatever may be the state of the law as to the amendment of orders, if any mistake has crept in, there is no power when an order has been made to vary it from time to time in consequence of a change of circumstances. On the other hand, it is said that the use of the word "orders" in the section goes a long way to shew that the Court must have power to make orders from time to time dealing with marriage settlements. If it were necessary to decide the question, I should rather lean to the view that the intention of the legislature was that the Court should interfere once for all with marriage settlements, and I am influenced in that direction in no slight degree by the fact that s. 32 of the principal Act contemplates security being given once for all whether for a gross sum of money or for annual payments. I do not think it necessary for me to decide whether the Court has power to vary an order once made dealing with a marriage settlement. A dictum of a learned judge has been referred to which seemed to indicate an opinion that the Court might vary an order; but there is a positive decision of Sir J. Hannen in the case of *Gladstone* v. *Gladstone* (1), which, though it has been spoken of as a dictum, was not an obiter dictum. In that case Sir J. Hannen said he had come to the conclusion that, whatever

(1) 1 P. D. 442.

1890

BENYON v. BENYON AND O'CALLAGHAN.

Butt, J.

other considerations might apply, counsel seeking to vary an order of this kind must confine himself to matters which had occurred before the order, and which might have been submitted to the Court to induce it to make a different order, but that he was not at liberty to go into anything which had occurred since the order was made. That is a decision which I understand has never been challenged in a Court of Appeal, and that being so, I must treat it, as I do treat it, as a decision that I am not at liberty to enter into circumstances which have occurred since 1876. I do not forget the observation made in argument that though this Act was passed in 1859 there has never been a case in which an order having once been made under s. 5 with regard to marriage settlements a fresh order making a variation in it has been granted. I must, therefore, refuse to interfere with the order of 1876 in the manner asked for. I dismiss the motion with costs.

Solicitor for petitioner: *W. Brewer.*

Solicitors for respondent: *Longbourne, Stevens & Powell.*

W. L.

1890

Feb. 4.

BUTLER *v.* BUTLER.

Divorce—Decree Nisi—Queen's Proctor, Intervention of—Collusion—Rescission of Decree—Security for Wife's Costs—Payment out of Registry.

A wife having obtained a decree nisi in a petition for divorce, the Queen's Proctor intervened and she was proved to have obtained the decree by collusion, to which her solicitors were parties. The petition was accordingly dismissed. The husband in the course of the proceedings had paid into the registry two sums of money to cover the wife's costs of the two proceedings:—

Held, that under the circumstances the wife was not entitled to an order that such money should be paid out to her or her solicitors.

It is not the practice of the Court to order the husband to give security for his wife's costs incidental to an intervention of the Queen's Proctor.

APPLICATION for the payment to the wife or her solicitors of sums of money paid into the registry by the husband to cover her costs.

There had been two trials in the case. The first was of cross petitions of the husband and wife praying for a dissolution of the marriage. In pursuance of a compromise, to which the wife's

solicitors were parties, a decree nisi had been pronounced on the wife's petition, the husband being condemned in costs. The Queen's Proctor then intervened, and charged the wife with collusion, suppression of material facts, and adultery. The jury found that the wife had been guilty of collusion and suppression of material facts, but they failed to come to an agreement on the question of her adultery. Butt, J., thereupon rescinded the decree nisi. The Court of Appeal affirmed this decision, and ultimately the petition was dismissed on payment of the Queen's Proctor's costs.

In the course of the proceedings the husband had paid into Court on the order of the registrar two sums amounting to 90*l.* to cover the wife's costs, and it was alleged that of this 50*l.* had been specifically appropriated by the order to cover the costs of the Queen's Proctor's intervention.

On July 23 application was made on behalf of the wife for an order that this sum should be paid out to her; but the Court refused to make any order until it was decided whether the decree should be made absolute or not. (1) In the interval between the first and second suits the wife had changed her solicitors.

Stevenson, for the wife and her solicitors, moved that the 90*l.* be paid out to her or them.

Middleton, for the husband, contrà. With regard to the 50*l.*, *Gladstone* v. *Gladstone* (2) shews that the Court has always refused to give assistance to the wife to defend herself in an intervention by the Queen's Proctor.

Jacques, for the Queen's Proctor.

BUTT, J. This application must be refused. Two points are brought before me. One is that I should order the payment to the solicitors of the sum deposited by the husband to cover the costs of the first proceedings. That application was based on the decree nisi, of which it was a part, that the husband should pay his wife's costs in the usual way. But the Queen's Proctor intervened, alleging that the decree ought to be set aside on the ground that it had been obtained by collusion and by withholding

(1) 14 P. D. 160. (2) Law Rep. 3 P. & D. 260.

1890

BUTLER v. BUTLER.

Butt, J.

material facts from the knowledge of the Court, and he further charged the wife with adultery. The jury, though they could not agree on the question of adultery, found that there had been collusion, and the decree nisi was rescinded. Dissatisfied with this order, the wife went to the Court of Appeal, and that Court held that the order rescinding the decree was rightly made. But the order to pay the wife's costs was part of the decree, and was rescinded with it. There is, therefore, now no order to pay the wife's costs, and I decline to make a new order. It is said that it is hard on the solicitors, but they were parties to the collusive agreement, and that being so, I consider them entirely disentitled to the consideration of the Court. Then I am asked to order that the husband pay the wife's costs of the second trial, but I decline to do so. In the first place, I consider the wife personally disentitled to any such order. She was guilty of collusion, by which she improperly obtained a decree from this Court, and she is not entitled to any consideration. But it is said that however that may be, the present solicitors were not concerned in that question of collusion, and that an order ought to be made securing them their costs for defending the wife's interests in the Queen's Proctor's suit. If the solicitors stood in the same position as those solicitors who sanctioned the first collusive agreement, I should view their claim in the same light. It is said that they came into these proceedings knowing nothing of the collusion; but the question is, whether they have any specific position apart from the mere interest of the wife. I consider that they have not. It has not been the practice to order a husband to pay a sum of money or to give security for a wife's costs in a trial with the Queen's Proctor, and in the case to which I am referred, *Gladstone* v. *Gladstone* (1), the Court refused, and I think quite rightly, to make any such order. Therefore, if they choose to go on and defend the wife against the Queen's Proctor they have no claim to be considered in an exceptional way. But it is said that an order was made to secure the wife 50*l.* for the Queen's Proctor's trial. On looking at the minutes I see that an order was made, and it may be that the solicitors were misled by it. So far as I

(1) Law Rep. 3 P. & D. 260.

am able to ascertain that was an order, made in the registry without any discussion as to the specific purpose to which the funds should be applied. It was not made by the President, on motion, and I do not think it was rightly made. The fact of its being made cannot induce me to depart from the uniform practice of the Court. I therefore refuse the application.

Solicitors for the husband: *Goldring, Mitchell & Co.*

Solicitors for the wife: *Clinton & Buckley; The Queen's Proctor.*

W. L.

WARTER *v.* WARTER.

1890
Jan. 14.

Probate—Declaration of Legitimacy—Writ of Summons—Claim for Probate and declaration of Legitimacy included in the same Writ.

In an action for probate the Court refused to allow the plaintiff to include in the writ of summons a prayer for a declaration of legitimacy.

THIS was a probate action in which the will of Col. Henry de Grey Warter deceased was propounded by Frances Isabella O'Callaghan, as guardian and next friend of Ellen Annette Warter, daughter of the deceased, and probate was opposed by the Rev. W. H. Redman, the guardian *ad litem* of Henry de Grey Warter, son of the deceased.

The endorsement on the writ of summons was as follows:—

"The plaintiff claims, as one of the natural and lawful children of Col. Henry de Grey Warter, a declaration that the marriage had and solemnized on February 3, 1880, between her father and mother, Col. H. de Grey Warter and Annette Louisa Taylor, was a valid marriage and that the plaintiff is the natural and lawful daughter of Col. Henry de Grey Warter and his wife Annette Louisa Warter.

"A declaration that the last will and testament of Col. Henry de Grey Warter, late of Her Majesty's Royal Artillery, who died at Umballa, E.I., on March 23, 1889, dated February 6, 1880, is of true force and validity; and a declaration that the said will, dated February 6, 1880, was not revoked by reason of the ceremony of marriage gone through between the said Col. Henry de Grey Warter and the said Annette Louisa Taylor on April 2, 1881."

1890

WARTER v WARTER

The registrar had refused to allow the writ to issue in this form on the ground that, although this was a probate action, the statement of claim included a matter which would be the subject of litigation in a suit for a declaration of legitimacy.

The plaintiff appealed.

B. Deane, for the plaintiff. The writ ought to be issued in the form proposed. [He cited *In the Goods of Tharp* (1), where the question was whether the Court of Probate could decide not only that there was a power to execute a will, but also of what the property passing under the will consisted.]

[BUTT, J. Your difficulty is that you are joining two causes of action, one of which is triable by the Probate Rules and the other by Divorce Rules, which are different in some respects. For instance, a probate action is commenced by writ—and a Legitimacy Declaration suit by petition, which set of rules, do you say, should be applicable to this case.]

The Judicature Act, s. 24, sub-s. 7, removes that difficulty, for it provides that the Court may grant all such relief as any of the parties before it may appear to be entitled to, and may decide all matters in controversy between the parties finally and completely, so that all multiplication of legal proceedings may be avoided.

BUTT, J. That is where the matters have been properly brought before the Court. How can you say that this claim for a declaration of legitimacy is brought properly before me, when the Legitimacy Declaration Act prescribes that it shall be brought before me by petition and not by writ? If you are content to confine your claim to the issues raised by the will, there need be no difficulty, but I cannot go on to make a declaration of legitimacy in a probate action.

Motion refused.

Solicitors: *Le Brasseur & Oakley.*

(1) 3 P. D. 76.

W. L.

[IN THE COURT OF APPEAL.]

1889
Dec. 9, 10.

THE BATAVIER.

Practice—Costs—Appeal—Inevitable Accident.

In an action for collision the Admiralty Division held that the defendants' vessel was solely to blame for the collision. The Court of Appeal reversed this decision, holding that the collision was caused by inevitable accident:—

Held, that the case was within the general rule that in all appeals the unsuccessful party must bear the costs, except under special circumstances; but the Court having regard to the way in which the case had been conducted by the defendants, ordered that they should only receive the costs of the appeal, and that both parties should bear their own costs in the Court below.

APPEAL from a judgment of Butt, J., whereby he held that the *Batavier* was to blame for a collision between that ship and the plaintiffs' steamer, the *New Pelton*. The Court of Appeal held that the collision was the result of an inevitable accident, viz., the violence of the weather, and reversed the decision of Butt, J.

Sir W. Phillimore (*Aspinall*, with him), for the defendants. Upon this finding the defendants are entitled to the costs both of the appeal and in the Court below. The Court of Appeal laid down a general rule in *The Swansea* (1) as to the costs of an appeal, and in *The Naples* (2) Butt, J., applied the rule as to costs in other divisions to the case of a defendant who successfully set up the defence of inevitable accident.

Barnes, Q.C. (*Pyke*, with him), for the plaintiffs. The Admiralty rule that when the defence of inevitable accident is successfully set up each side pays its own costs was not referred to in *The Swansea* (1), and was followed in *The Buckhurst* (3); in *The Naples* (2) judgment was given on the pleadings only.

LORD ESHER, M.R. It is time that it should be laid down once for all that in every case, unless there are special circumstances to take it out of the general rule, the party who is successful obtains his costs, and the party who loses pays them. In the present case, if the defendants had not so complicated it

(1) 4 P. D. 115. (2) 11 P. D. 124.
(3) 6 P. D. 152.

1889

THE BATAVIER.

Lord Esher, M.R.

by circumstances to which I shall presently allude, and had set up the defence of what is called inevitable accident, and had succeeded, they would have been entitled to their costs. But from the beginning the crew of the *Batavier* have not told the truth; they have, on the contrary, told outrageous falsehoods, and they made it inevitable for a false defence to appear on the pleadings. This false defence, persisted in from the beginning, necessarily affected the conduct of the plaintiffs, and they might naturally conclude under such circumstances that their own story was correct. Therefore each party must pay their own costs in the Court below; but the defendants must have the costs of the appeal.

LINDLEY and LOPES, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiffs: *Gellatly & Warton.*
Solicitors for the defendants: *Botterell & Roche.*

E. S. R.

1889 *July* 30; *Aug.* 12.

1890 *Feb.* 11, 12.

[IN THE COURT OF APPEAL.]

THE ORCHIS.

Ship—Mortgagee—Arrest of Ship by Master—Payment of Claim by Mortgagee—Right to Indemnity from Owners.

The plaintiffs were mortgagees of forty-eight sixty-fourth shares in a vessel. The master having brought an action in rem against the vessel and arrested her, the plaintiffs paid the amount of his claim in order to obtain the release of the vessel from arrest and to enable them to take possession under their mortgage. The plaintiffs then sued the defendants, the owners of sixteen sixty-fourth shares, to recover the amount paid to the master:—

Held, that as the mortgagor and the other co-owners were severally liable for the disbursements paid by the master, and as the plaintiffs could not obtain possession of their shares as long as the vessel was under the arrest of the Court, they were entitled to recover from the defendants the amount paid by them.

MOTION for judgment.

The plaintiffs were the registered mortgagees of forty-eight sixty-fourth shares of the *Orchis*, belonging to one Hornstedt; the defendants who appeared were owners of sixteen sixty-fourth shares in the same ship. In May, 1886, the *Orchis* was arrested

when lying in the Bristol Docks in an action by her master in rem for disbursements, the amount of which was 422*l.* 15*s.* 7*d.* In order to obtain the release of the *Orchis*, and to enable them to take possession under their mortgage, the plaintiffs paid off the above claim with costs, and thereupon took possession of the *Orchis* as joint owners with the defendants, the owners of sixteen sixty-fourth shares. She remained in dock, and the plaintiffs paid sums for dock dues, expenses of watching and care of her, and for her repairs to the amount of 672*l.* 11*s.* 1*d.* The plaintiffs claimed to recover these sums from all the defendants. The mortgagor of the plaintiffs' shares did not enter an appearance. The amounts having been referred to the registrar, he found by his report that the plaintiffs were entitled to the sums claimed. The case is reported on the first point only, the second point turning on correspondence between the parties.

Barnes, Q.C., and *Aspinall*, for the plaintiffs. The plaintiffs are entitled to judgment. The first payment was valid; it was necessary to enable the plaintiffs to obtain possession of their property, and they are therefore entitled to recover the amount from the defendants: *Lampleigh* v. *Braithwaite* (1); *Johnson* v. *Royal Mail Steam Packet Co.* (2)

J. Walton, (*French, Q.C.*, with him), for the defendants. The first payment was not compulsory and cannot be recovered; the master had no maritime lien for his disbursements: *The Sara* (3), and had therefore no claim which he could enforce against the ship. It is true that the law was not clearly ascertained at the time of the payment; but that cannot affect the legal rights of the parties. [He referred to *Bates* v. *Townley*. (4)] Moreover, if the master had no maritime lien, but only a right in rem against the property of persons liable to him, it was not necessary for the plaintiffs to pay off the master's claim in order to protect their interests.

BUTT, J. This is a suit by Messrs. Smith, Brothers, & Co., mortgagees of forty-eight sixty-fourth shares of the ship *Orchis*, which shares were mortgaged to them by one Hornstedt, who was

(1) 1 Sm. L. C. 8th ed. 151.
(2) Law Rep. 3 C. P. 38.
(3) 14 App. Cas. 209.
(4) 2 Ex. 152.

1890

THE ORCHIS.

Butt, J.

the managing owner, as well as the owner of these shares, against the defendants, who are the owners of the residue of the shares, that is sixteen sixty-fourth shares, of the ship.

It appears that before the mortgagees entered into possession of the ship one Leslie, the master, had incurred a debt which, with the costs of suing for recovery, amounted to 441*l.* 4*s.* 10*d.* for disbursements of the ship. For that sum he instituted proceedings in rem against the ship and arrested her in this Court. She was lying under arrest of this Court, liable as I understand it to that amount. She had been properly arrested by the master, in the enforcement of his claim by virtue of the Act of Parliament, which gave him a right to proceed in rem.

At that time it was supposed, on the authority of decided cases, that the master had a maritime lien for his disbursements. By a decision of the House of Lords which has been given since it appears that that notion was founded upon an erroneous view of the law, that the master never had any maritime lien at all for his disbursements, but only a claim against the owners, which he had a right to enforce against the ship in rem.

Now, the ship being under arrest in this Court, and the plaintiffs desiring to get possession of that which they were entitled to possession of, whatever it may have been, paid off this 441*l.* 4*s.* 10*d.* to Leslie, and so discharged the ship from arrest. They did so without any express authority from the defendants in this suit, and they base their claim to re-imbursement upon a promise by the defendants to repay them, which they maintain the law implies under the circumstances, they, the plaintiffs, having been compelled to pay a sum to pay which the defendants were legally compellable.

To take the latter limb of that alternative first. It is clear that the defendants were legally compellable to pay this 441*l.* 4*s.* 10*d.*, because it was a joint liability of theirs for disbursements made by their servant, in an adventure in which they were jointly interested and concerned.

But then it is said, admitting that the defendants were legally compellable to pay this sum of 441*l.* 4*s.* 10*d.*, it is not accurate to say that the plaintiffs have been compelled to pay it. Now what is the position? The plaintiffs could not get possession

of their shares—I mean, the shares that were mortgaged to them, or of the ship, except by paying this sum. It is clear, on authority, that if a man is entitled to possession of a chattel and can only get possession of that chattel by paying a debt which another is legally compellable to pay, and he does pay that debt, the law will imply a promise on the part of the other to repay him what he so disburses.

But it is said, taking that as the law, the facts of this case do not warrant the implying of the promise from the defendants to the plaintiffs to recoup them, because it is said they were only the mortgagees of forty-four out of the total sixty-four shares in this ship. They were not entitled to the possession of the ship; they could have protected their forty-four sixty-fourth shares from sale under the process of the Court by intervening and shewing that they, as mortgagees, had a superior right or lien, or claim to that of Leslie, the person proceeding for the disbursements.

It is true they might have done so, but that would not have given them possession of the ship, or of their shares in the ship.

Now, what was the plaintiffs' right with reference to this ship? It is quite right, as has been pointed out, to say that they were not entitled to possession of the whole, but only entitled to possession of forty-four sixty-fourths; they were entitled to a possession jointly, it is true, with others of the owners, of the whole sixty-four sixty-fourth shares, and they could not get that joint possession without paying off this sum of money. Their intervention as mortgagees, and their shewing in Court that they had a superior claim to the plaintiff Leslie, would not have given them that possession at all; the Court would not have taken its hand off the ship. Therefore, in order to get what they were entitled to, namely, joint possession with the holders of shares other than Hornstedt's shares, they really were compelled to pay this sum of money. Having been compelled to pay it, the law implies a promise on the part of the owners of the ship to repay them; that promise is the one upon which the plaintiffs are suing in this case, and I hold that they are entitled to recover. Then it was said that even so the plaintiffs here ought only to recover so much of the 441*l.* 4*s.* 10*d.* as the defendants, the shipowners,

1890

THE ORCHIS.

Butt J.

other than Hornstedt, would be liable to pay, and that in equity, at all events, the present plaintiffs ought to bear Hornstedt's proportion of that sum. I do not agree with that proposition at all. One of the principal objects of taking a mortgage security on land or a chattel is to secure the performance of the mortgagor's promise to pay. In other words, to secure against the mortgagor's inability to pay—to secure the mortgagee against the insolvency of his mortgagor. That is what has been done here. Why are those who have advanced money on these shares (because the mortgagor has been unable to perform his liability to them, upon the one hand, or to his co-owners in the ship on the other)—why are they to forfeit part of their security? I fail to see why; and therefore I hold that the plaintiffs in this suit are entitled to recover the whole of the sum of 441*l.* 4*s.* 10*d.* from the defendants.

The defendants, the owners of sixteen sixty-fourth shares, appealed.

Feb. 11, 12, 1890. *French, Q.C.*, and *J. Walton*, for the defendants.

Barnes, Q.C., and *Aspinall*, for the plaintiffs.

The cases of *Edmunds* v. *Wallingford* (1) and *Dickinson* v. *Kitchen* (2) were cited in addition to those referred to in the Court below.

LORD COLERIDGE, C.J. This action, which, although it was tried before the learned judge of the Probate and Admiralty Division, is in all its incidents and character a common law action, is one brought by the mortgagees of shares in the ship *Orchis* to recover two sums, one a sum of 441*l.*, and the other a sum of 672*l.*, the rights as to which stand upon somewhat different grounds. The action was brought before Butt, J., who decided in favour of the plaintiffs in respect to both sums. Different points have been raised with regard to the two sums, and somewhat different arguments advanced. The sum of 441*l.* was a sum paid by the plaintiffs in the action in order to release the ship, of which they were the mortgagees, from the hands of

(1) 14 Q. B. D. 811. (2) 8 E. & B. 789.

the Admiralty Court, which had seized the ship at the suit of the captain of the ship, who brought an action against the owners for disbursements which he had made for necessaries for the ship, and, under the practice of the Admiralty Court, he had a right, in order to enforce the payment of the sum, to seize the ship and take proceedings against the ship in rem. That was done, and the seizure was, according to practice of the Admiralty Court, a perfectly legal seizure. The mortgagees, however, wanted to get possession of the ship; but they could not do so as long as the hand of the Admiralty Court was upon it, and therefore they paid 441*l.* odd for the release of the ship, which was in consequence released. This amount they claim from the defendants in the action who are the owners of sixteen sixty-fourths of the ship. The plaintiffs were mortgagees of forty-eight sixty-fourths, and the defendants were the holders amongst themselves of the remaining sixty-fourths. From the moment the mortgagees paid that sum of 441*l.* to release the ship from the hand of the law, there was that amount of pressure which the law requires in order to found a claim for, and to enforce a repayment of, a sum of money paid by one person for the benefit, or partly for the benefit, of another. That principle of law is laid down in *Edmunds* v. *Wallingford* (1), which was decided in this Court in 1885, and which is directly in point. That case was decided by Sir James Hannen, Lindley, L.J., and myself, the judgment of the Court being delivered by Lindley, L.J. Two or three sentences from that judgment I will read. The Lord Justice says: "In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized shall have been lawfully seized; and it was contended before us that the son's goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application, except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between

(1) 14 Q. B. D. 811.

1890

THE ORCHIS.

Lord Coleridge, C.J.

them the wrong goods have been seized that any question arises." Then the learned judge goes on to shew what application that principle had to the facts of that particular case. There is the principle clearly enough stated. The result is this: When there is a seizure rightfully made as between the parties (rightfully I mean, in point of law), then the person who claims for money paid in extricating property of his own from being subject to what is a lawful seizure—if in extricating that property he pays money for the benefit of somebody else—is entitled to recover the amount from such person. The principle laid down in *Edmunds* v. *Wallingford* (1), is directly in point in the present case. The process of the Admiralty Court was properly applied to the seizure of the ship; the payment of the sum claimed by the captain was necessary to obtain the release of the ship, and, therefore, it follows that those who paid that sum can recover it from the defendants. [The Lord Chief Justice then dealt with the second point.]

LORD ESHER, M.R. The first point in the case is of some general importance, but the second is a mere question of the consideration of letters and circumstances which occurred between the particular parties. As to the first point, this is a purely common law action, being for money paid by the plaintiffs on behalf of the defendants, and on an implied promise to repay. Before the Judicature Acts the action could not have been brought in the Admiralty Division, and must therefore have been tried at common law. The only reason that it is necessary to discuss Admiralty procedure in this case, is to see whether that pressure which must exist in order to found an implied promise to pay existed in this case. The plaintiffs were mortgagees of forty-eight sixty-fourth shares, the defendants who appeared being the owners of the remaining sixteen sixty-fourth shares. The captain was employed by the co-owners, those who had mortgaged their shares and those who had not. They were not merely co-owners of the ship, they had agreed to use their property as a means of earning money, not by chartering her, but by sailing her themselves. So far, therefore, they were partners in the adventure,

(1) 14 Q. B. D. 811.

for which they had employed the captain—all of them, the mortgagors and the defendants, were the employers of the captain. The mortgagees, the plaintiffs in this case, were not employers of the captain. He was not their captain, and they were not liable to him at all. It was the defendants and the mortgagors who were liable to him. The captain made the disbursements for the benefit of the ship. He acted for the persons who had employed him. What were the captain's rights according to Admiralty law? His rights were, if he was not paid for such disbursements as those mentioned, to have a warrant from the Admiralty Court to seize the ship, and that the ship should be seized under that warrant. The effect of that, according to Admiralty law, was that the ship from that time was held in an action in rem by the Admiralty Court as security for the captain's claim if he made it out. The result of that action in rem was binding upon all the world; therefore the seizure of the ship was a good seizure against all the world. The seizure of a ship by the Admiralty Court in an action in rem, where the plaintiff has a right in an action in rem, is a good seizure against all the world. The seizure of the ship and the holding of the ship were good, according to Admiralty law, against the mortgagees of the ship, although they owed nothing to the captain. What was the result, in point of fact of such a seizure by Admiralty law against such persons as these mortgagees? The mortgagees had acquired the right of a joint possession of the ship, not with the mortgagors; they had a right to pay them out at once, and to become joint owners in possession; but by reason of Admiralty law the Admiralty Court could step in and prevent the mortgagees exercising that right. They could not have acquired joint possession of those mortgaged shares without an order of the Admiralty Court, and that order would not be made, because the Admiralty Court would not take off its hand until the suit was determined between the captain and those owners of the ship who had employed him, and on whose behalf he made the disbursements and until his claim was paid or released by the action of the Court. If the claim was paid, or bail was put in, the ship would be released. But if the ship was released, what would be the position? The moment she was released the mortgagees and

1890

THE ORCHIS.

Lord Esher, M.R.

co-owners would be entitled to joint possession; and if either of them took possession, that would be not only for themselves but for others. It would be a joint possession. The mortgagees here desired to have possession. They had good substantial reasons for their wish, and it was to their interest. They had rights which, after the seizure by the Admiralty Court, the law prevented them from exercising. How came the law to prevent them exercising their rights? Solely on account of the action of the defendants, they were liable to the captain for a debt which they had not paid. The Admiralty Court had the right to seize the ship in consequence of the defendants' default. By reason of this default the law was brought into operation, and it seized all the property in which the plaintiffs had a real mercantile business interest, and of which they desired immediate possession. Under those circumstances, in order to obtain that immediate possession, they pay according to the law. The case is therefore within the authority of the case cited by the Lord Chief Justice. It is within the principle that if by reason of the default of one person the property of another becomes subject to seizure by law, if the person whose property is thus seized by a right process of law in consequence of the default of another pays the debt, the law implies a promise from the one whose debt is paid to repay it to the person who paid it.

[The Master of the Rolls then shortly dealt with the second point.]

FRY, L.J. I am of the same opinion, and only desire to observe that this case is peculiar in its incidents. Here the pressure upon the plaintiffs arose from the right of the Admiralty Court to seize the entire vessel until the rights of the parties were ascertained. It was argued that, as the result of the Admiralty suit, the shares and interests of the mortgagees could not be made responsible to satisfy the captain's claim. That may be so; but inasmuch as, according to the practice of the Admiralty Court, the whole vessel was seized and detained until the rights of the parties were ascertained, the plaintiffs were put to that kind of inconvenience which they might reasonably try to escape from by making payment, which raised the implication that the

defendants should be asked to pay part of the expense of avoiding that inconvenience.

1890

THE ORCHIS.

Appeal dismissed.

Solicitor for plaintiffs: *F. B. Moss.*

Solicitors for defendants: *Wynne, Holme & Wynne.*

E. S. R.

[IN THE COURT OF APPEAL.]

Jan. 23.

SMITH *v.* SMITH.

Restitution of Conjugal Rights—Written Demand—Additional Rules and Regulations, 1875, *r.* 175—*Practice.*

In a petition by a wife for restitution of conjugal rights it appeared that after eleven years' separation, and before filing the petition, she addressed a letter to her husband expressing a desire to return to cohabitation, and demanding restitution of conjugal rights, and threatening to commence legal proceedings in case of refusal. The husband acknowledged the receipt of his wife's letter, but refused to receive her back:—

Held, reversing the decision of Butt, J. (*ante*, p. 11), that the wife's letter was a sufficient written demand within the meaning of rule 175 of the Additional Rules and Regulations, 1875, and that she was entitled to a decree for restitution of conjugal rights.

Field v. *Field* (14 P. D. 26) distinguished.

THIS was an appeal from a decision of Butt, J. (*ante*, p. 11), refusing to grant a decree for restitution of conjugal rights on the petition of a wife on the ground that she had not complied with rule 175 of the Additional Rules and Regulations, 1875, by sending a written demand for restitution of the conjugal rights.

The petitioner on October 8, 1866, sent a letter to the respondent which was written by her solicitors and signed by herself, expressing her desire to cohabit and live with him, and demanding from him a full restitution of conjugal rights; she also notified to him that in the event of his not receiving her it was her intention to apply to the High Court of Justice for the restitution of her conjugal rights. The letter is set out at length in the report of the decision in the Court below.

The respondent in reply declined to receive back the petitioner or to make any home for her.

1890

SMITH v. SMITH.

The respondent entered an appearance to the citation, but did not file any answer.

The learned judge held, on the authority of *Field* v. *Field* (1), that the letter was not a proper demand under rule 175. The petitioner appealed.

Searle, for the petitioner. This case is distinguishable from *Field* v. *Field* (1), on several grounds. In the first place the letter was signed and sent by the petitioner herself and not by her solicitors: in the second place it contained an expression of her desire to return to her husband which the letter in *Field* v. *Field* (1) did not contain; in the third place the husband returned an absolute refusal to receive his wife, whereas in the former case there was no refusal and no proof that he ever received the letter. The object of the rule was to give the respondent an opportunity to resume cohabitation or to give his reason for not doing so.

No counsel appeared for the respondent.

COTTON, L.J. In this case Butt, J., appears to have refused to make a decree for restitution of conjugal rights on the ground that the petitioner had not made a sufficient application to her husband within rule 175, considering that the case was governed by the decision in *Field* v. *Field* (1). But I do not think that the distinctions between the present case and *Field* v. *Field* (1) were sufficiently considered by the learned judge. In *Field* v. *Field* (1), the letter was written by the petitioner's solicitor. It was an ordinary solicitor's letter simply demanding a restitution of conjugal rights in peremptory terms, not expressing any willingness on the part of the wife that there should be a reconciliation, but threatening legal proceedings in case of the husband's refusal. The letter in the present case was very different. It was a letter from the petitioner herself, and she notifies her desire to return to live with her husband. Then she demands a full restitution of her conjugal rights of which she had been deprived, but that must be read with reference to what she said before of her desire to return to her husband. It is true that she says that in case of his refusal she intends to apply to the High

(1) 14 P. D. 26.

Court of Justice, but I think there was nothing objectionable in that. It was not like holding a pistol to her husband's head and requiring him to take her back, as was said in *Field* v. *Field.* (1) Although I still adhere to what we said in *Field* v. *Field* (1), yet I think that this letter being written by the wife herself and not by her solicitors, and expressing her desire to return to cohabit with her husband, cannot be regarded as a mere threatening letter like the letter in that case, so as to prevent her from obtaining the decree which she asks for. In my opinion the appeal must be allowed and the decree granted.

LINDLEY, L.J. I also think that this case is not governed by *Field* v. *Field* (1), to the extent to which the learned judge held it to be. That case differs from the present in more respects than one. In the first place the letter there was nothing more than a lawyer's letter. In the next place the present appellant expressed what we were unable to find in the letter in *Field* v. *Field* (1), her desire to return to cohabit with her husband. Thirdly, it appears in the present case that the husband received the letter and answered it immediately with an unqualified refusal to take his wife back; whereas in *Field* v. *Field* (1) there was no proof that he had ever received the letter.

LOPES, L.J. Whether I should have arrived at the same construction of rule 175 as the judges did in *Field* v. *Field* (1), it is not necessary to say; but certainly this case is distinguishable from that. Here the letter was written not by the solicitor but by the wife herself, and expressed her desire to return to her husband. In *Field* v. *Field* (1), there was no answer from the husband; but here there was an answer from the husband in which he distinctly states that he will not take his wife back. I am therefore of opinion that the appeal must be allowed, and a decree granted with costs.

Appeal allowed.

Solicitors: *Wontner & Sons.*

(1) 14 P. D. 26.

M. W.

1890
Feb. 5.

[IN THE COURT OF APPEAL.]

FRY *v.* FRY.

Nullity—Alleged Insanity of Petitioner—Guardian ad litem—Order under Rule 196.

An order ought not to be made under r. 196, assigning a guardian ad litem to a person alleged to be of unsound mind, where there is a substantial and bonâ fide dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian.

Order of Butt, J. (ante, p. 25) affirmed.

Whether r. 196 applies where the person has not been found lunatic by inquisition, *quære.*

APPEAL from the order of Butt, J. (ante, p. 25.)

The facts, as already stated, were that Mr. and Mrs. Fry were married in June, 1889. On November 13, 1889, a son of Mrs. Fry, by a former marriage, obtained from the registrar an order under rule 196 (1), assigning him to be his mother's guardian for the purpose of promoting a suit declaring her marriage with Mr. Fry to be void, on the ground that she was insane at the time of its being solemnized. On December 10, 1889, Mrs. Fry applied to discharge this order, adducing evidence to shew that she was of sound mind. Butt, J., discharged the order. The next friend appealed.

Willis, Q.C., and *Searle,* for the appeal. The order for a guardian ad litem was made under rule 196 of the regulations of the Divorce Division. This rule was intended to meet two cases: first, where a person had been found lunatic, and no committee had been appointed; and, secondly, the case of a

(1) Rule 196: "A committee duly appointed of a person found by inquisition to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a respondent; but if no committee should have been appointed application is to be made to one of the registrars who will assign a guardian to the person of unsound mind for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf. Provided that, if the opposite party is already before the Court when the application for the assignment of a guardian is made, he or she shall be served with notice by summons of such application."

person of unsound mind, but not so found by inquisition. The words "but if no committee should have been appointed" can hardly be intended to be confined to the case of a person found lunatic to whom no committee has yet been appointed, for the appointment of a committee usually takes place immediately after the finding.

[COTTON, L.J. I doubt whether the rule can apply where unsoundness of mind is an issue to be tried.]

In *Hancock* v. *Peaty* (1), soundness of mind was in issue, yet the cause was tried though there was only a guardian ad litem.

[LOPES, L.J. It appears to me that rule 196 does not apply where the person has not been found lunatic by inquisition.]

If it does not, a person whose sanity is disputed cannot be admitted to defend without an inquisition, which would be a great hardship. *Lord Durham's Case* (2) was tried without an inquisition, and so were *Hunter* v. *Hunter* (3), and *Cannon* v. *Smalley*. (4)

Reid, Q.C., and *Middleton*, for the wife, and *Bargrave Deane* and *Middleton*, for the husband, were not called upon.

COTTON, L.J. This is an appeal from an order of Butt, J., discharging an ex parte order of the registrar assigning a guardian ad litem to a person alleged to be of unsound mind. I will not give any opinion on the question whether, on the evidence before us, she was of unsound mind at the date of her marriage, or whether she is so now, for I go upon this ground, that an order ought not to be made under rule 196 for assigning a guardian ad litem where there is a bonâ fide dispute whether at the time of the application the party is of unsound mind. The question is whether the Court shall give to some other person the conduct of a suit, on the ground that this lady is incapable of acting for herself, and I think the Court ought not to do so where there is a bonâ fide dispute whether she is not capable of acting for herself. I do not at present feel disposed to assent to the view of Lopes, L.J., that this rule only applies to the case of a person found lunatic by inquisition. The rule applies equally to a party suing and to a party defending, and it

(1) Law Rep. 1 P. & D. 335.
(2) 10 P. D. 80.
(3) 10 P. D. 93.
(4) 10 P. D. 96.

1890

FRY v. FRY.

Cotton, L.J.

would be very serious to hold that, if a person of unsound mind is sued, no defence can be put in till he has been found lunatic by inquisition; but, where there is a bonâ fide dispute as to the sanity of the party, I think that an order for a guardian ad litem ought not to be made. The medical evidence adduced in support of the application to discharge the registrar's order shews that there is reasonable ground for contending that this lady is capable of managing her own affairs. I think, therefore, that the appeal must be dismissed, not on the ground that the registrar was wrong in making the order on the materials before him, but on the ground that the evidence adduced before the judge shewed that the case was not one in which such an order ought to have been made.

LINDLEY, L.J. This is an appeal from an order of Butt, J., discharging an order made by the registrar ex parte, appointing a guardian ad litem to a married woman for the purpose of promoting a suit to have her marriage declared invalid on the ground that she was of unsound mind when it was solemnized. She says that she is not of unsound mind, and has adduced medical evidence of some weight in support of that contention. It would be monstrous if a self-appointed guardian was allowed to go on with such a suit when a defence like that is made. The son may apply for an inquisition, and if she is found lunatic by inquisition the committee can sue, and if no committee is appointed a suit may be promoted by a guardian ad litem.

Upon the construction of the rule I am disposed to think that it only applies where a person has been found lunatic by inquisition; but I do not base my judgment on that—I go on the ground that, assuming rule 196 to be applicable where the party has not been found lunatic by inquisition, an order ought not to be made under it where there is a substantial bonâ fide dispute whether the party is of unsound mind at the time.

LOPES, L.J. This case raises two points—(1) Whether on the construction of the rule it applies to the case of a person who has not been found by inquisition to be of unsound mind. (2) Assuming that it does so apply, whether an order ought to be made

under it when there is a bonâ fide dispute as to the sanity of the party.

As to the construction of the rule, I am strongly of opinion that it ought to be read so as to make it apply only where there has been an inquisition under which the party has been found of unsound mind. If a committee has been appointed, he is the person to sue or defend; if no committee has been appointed to the person found by inquisition to be of unsound mind (which seems to me to be the reasonable way of reading it), a guardian ad litem may be appointed. I think it was intended that there should not be discussions before the registrar or the judge whether unsoundness of mind was made out. The rule is in one sense an enabling rule, as it enables the Court to appoint a proper person to act as guardian ad litem, but it is also to be looked on as restrictive, for it gives the conduct of the suit or defence to another person. It is not therefore to be construed with the same liberality as if it were simply enabling.

As regards the other point, assuming the rule to apply to the case, I agree with the Lords Justices that the power given by it ought not to be exercised where there is a bonâ fide dispute as to sanity.

Appeal dismissed.

Solicitors for wife: *Irvine, Hodge, & Borrowman.*
Solicitors for husband: *Fry & Hudson.*
Solicitors for guardian: *Wontner & Sons.*

H. C. J.

1890
Feb. 12.

[IN THE COURT OF APPEAL.]

BENYON *v.* BENYON.

Divorce—Settlements—Power to alter Order for Variation of Settlement—22 & 23 Vict. c. 61, *s.* 5.

Held, affirming the decision of Butt, J., that the power given to the Court by 22 & 23 Vict. c. 61, s. 5, of varying settlements after a final decree for dissolution of marriage, is a power to be exercised once for all, and an order made under it is not liable to be varied on the ground of a change of circumstances since the date of the order.

APPEAL from an order of Butt, J., rejecting an application for the amendment of an order for the variation of settlements.

By a settlement dated April 9, 1870, made on the marriage of A. W. Benyon, the petitioner, with Rosina Follett, the respondent, the respondent's property was vested in trustees upon trust to pay the income to the respondent for life for her separate use, and after her death to the petitioner for life, and after the death of the survivor upon trusts for the children of the marriage. The petitioner covenanted that he would as soon as possible appoint to the respondent for life, if she should survive him, all the annual income which he should have power to appoint in favour of a surviving wife under a settlement about to be made under the direction of the Court of Chancery.

The only child of the marriage, a son, was born in 1871.

On August 4, 1874, a decree for dissolution of the marriage, at the suit of the petitioner, was made absolute. On December 2, 1874, the petitioner presented a petition to vary the settlement of April 9, 1870, by directing the trustees thereof to pay to him during the joint lives of himself and the respondent the yearly sum of 600*l.*, and to pay during her life to him, or to the guardian for the time being of his son, 200*l.* a year, to be applied for the maintenance, education, and benefit of the son, and after the son attained twenty-one to pay the 200*l.* yearly to him, such payment to be increased to 300*l.* during such time as the respondent should survive the petitioner, and that the petitioner might be released from his covenant to appoint in favour of the respondent. On December 24, 1874, the respondent

married one O'Callaghan. At the time when the petition was presented the respondent had an income of about 1350*l.*, of which 1208*l.* 13*s.* arose from the settled funds and the rest from dower in the estate of her former husband, Mr. Follett. The petitioner was in no profession, and had no income except a voluntary allowance made to him by his mother. On July 11, 1876, Sir James Hannen made on the petition an order that out of the income of the funds subject to the settlement of April 9, 1870, there should be paid to the petitioner during the joint lives of himself and the respondent the sum of 300*l.* a year, and that a further sum of 200*l.* a year should be paid out of the same funds during the minority of the child of the marriage to the petitioner, or in the event of his death to the guardian of the child, and on the child's attaining twenty-one, to the child for life. And the Court directed that the petitioner should be relieved from his covenant to appoint in favour of the respondent. (1) On December 19, 1889, the respondent, then a widow, gave notice of motion that the order of July 11, 1876, might be discharged so far as it directed payment of 300*l.* a year to the petitioner during the joint lives of him and the respondent, and that in lieu thereof there might thenceforth be paid to him the sum of 150*l.* a year only, or that the petition of December 2, 1874, might be referred back to the registrar for further report, or that the respondent might be at liberty to present a petition for the purpose of obtaining a variation of the order of July 11, 1876. The grounds on which this application were made were, that owing to the payment off of various foreign bonds upon which parts of the settled funds were invested and the reinvestment of the moneys under the direction of the Chancery Division (in which the trusts of the settlement were being carried into execution), and the operation of the National Debt (Conversion) Act, 1888, the income of the settled funds had been reduced from 1208*l.* 13*s.*, which was its amount in 1876, to 832*l.* 11*s.* 11*d.*, leaving to the respondent, after payment of the 300*l.* and 200*l.* only 332*l.* 11*s.* 11*d.*; she deposed that her only other income or property was the above-mentioned dower, which in 1888 brought in 158*l.* She further deposed that on the death of the petitioner's

(1) 1 P. D. 447.

1890

BENYON v. BENYON.

mother, who died in April, 1889, he had become entitled to a life interest of 300*l.* a year, to her personal estate amounting to about 2000*l.*, and to other property.

On January 14, 1890, Butt, J., refused the application, holding that he had no power to vary the order of July 11, 1876, on the ground of circumstances which had occurred after it was made. The respondent appealed.

Inderwick, Q.C., and *P. S. Gregory*, for the respondent. The question turns on the construction of the Divorce Act of 1859 (22 & 23 Vict. c. 61, s. 5), which gives power to make such orders with reference to the application of settled property, or any part thereof, for the benefit of the children of the marriage or their parents as to the Court shall seem fit. No time is limited for the application. In *Gladstone* v. *Gladstone* (1) it was held that the Court had jurisdiction to make a second order, though as a general rule it would not do so on the ground of change of circumstances since the order. In *March* v. *March* (2) the Court rejected the notion that an order must be made once for all. The Court will put upon the section a construction which will be convenient in practice, unless the words are too strong the other way. Sects. 32 and 45 of the Divorce Act, 1857 (20 & 21 Vict. c. 85), are framed so as to shew that they contemplate only the making a single order, for a security is to be given or a settlement made. Section 5 of the later Act does not contemplate the execution of any instrument, but gives the power to make orders, which naturally means to make them from time to time, and there is no such inconvenience in doing so as would arise under the earlier Act. In *Gladstone* v. *Gladstone* (1) all the circumstances of the case were taken into consideration, but if the judge meant to lay down, which it is submitted he did not, that a second order could not be made, his decision was wrong. Sect. 5 shews on the face of it that the benefit of the parties is to be looked at, and that is best consulted by having a continuing power which enables the Court to adjust the provision to the circumstances; where the legislature intended an irrevocable order, it expressed that intention, as in s. 32 of the

(1) 1 P. D. 442. (2) Law Rep. 1 P. & D. 440.

Act of 1857. The case for a variation here is very strong, as the wife will have a much less proportion of the income than was intended for her at first.

Bayford, Q.C., and *Middleton*, for the petitioner. The case discloses no great hardship. The wife has nearly 500*l.* a year left. There is no precedent for an application of this nature since *Gladstone* v. *Gladstone* (1), and there is no jurisdiction to grant it. In *Cavendish* v. *Cavendish* (2) an order for variation of a settlement was reviewed, but it was on the ground that the order as drawn up did not express what the Court intended. If an order had been made for application of part of the capital it would be irrevocable, and there is no reason why an order for variation of the trusts of a settlement as to income should not equally be so. The Acts keep up throughout a distinction between orders for provisions in the nature of alimony while the conjugal relation subsists and orders made on or after decree.

Inderwick, Q.C., in reply.

COTTON, L.J. This is an appeal from a decision of Butt, J., refusing an application by a divorced wife to reduce the yearly sums directed by a former order to be paid to the husband out of her settled property. The original order was made under 22 & 23 Vict. c. 61, s. 5, which first gave the Divorce Court power over settled property. This is a power different from that given by s. 4 to make orders "from time to time," which is a power relating to children whose status is not altered by a dissolution of the marriage, and different from the powers as to provision in the nature of alimony which are to be exercised while the relation of husband and wife is still subsisting. Under s. 5 the Court has power to vary the trusts of a settlement, and in my opinion it was intended that the Court should consider how far they ought to be varied, and make an order once for all. If the Court can take off part of the burden originally imposed, it must have power to add to that burden, and it is not desirable that the arrangement should be liable to fluctuation. The original order was made on full materials being laid before the Court; the property was invested in securities not of the most

(1) 1 P. D. 442. (2) 38 L. J. (P. & M.) 13.

1889

BENYON v. BENYON.

Cotton, L.J.

approved character, so the order did not give the husband a share of the income, but a definite yearly sum. The matter was fully gone into then, and the Court has never altered an order so made under this section, though no doubt it might frame its original order so that the allowance would vary according to circumstances.

LINDLEY, L.J. I think that according to the true construction of the section the Court must make an order once for all. There is nothing in its language that points at varying an order when made. At first sight indeed it might appear that nothing could be more reasonable than for the Court to have power to vary the provisions for the parties as circumstances change. But this is a power to vary the trusts of a settlement when the relation of husband and wife has determined, and the object of the legislature appears to have been to enable the Court to make an order which will give the parties the same benefits as they practically would have if the conjugal relation had continued. It is easily seen that great mischief might arise if an order of this kind were not to be treated as permanent, but liable to be altered at a subsequent time.

LOPES, L.J. This section gives the Court a power which only arises after final decree, i.e., after the relation of husband and wife has ceased, and I think that under it the Court has only power to make one order. I felt some doubt on the question till I had heard Mr. Bayford's argument, in which he pointed out that throughout the Acts a distinction was kept up between orders in the nature of alimony and orders made after final decree. The previous section speaks of making orders "from time to time," which shews that where the legislature intended to authorize the making temporary orders it said so. I agree with the view expressed by Sir James Hannen in *Gladstone* v. *Gladstone.* (1)

Appeal dismissed.

Solicitors: *W. Brewer, Longbourne, Stevens, & Pond.*

(1) 1 P. D. 442.

H. C. J.

[IN THE COURT OF APPEAL.]

1890
Feb. 26, 27.

O'SHEA *v.* O'SHEA AND PARNELL.
EX PARTE TUOHY.

Divorce—Practice—Jurisdiction—Appeal—Attachment for Contempt of Court —Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Criminal Matter.*

An application by a party to a civil action for an attachment against a person not a party to the action, for contempt of Court in the publication of comments calculated to prejudice the fair trial of the action, is a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873 (36 & 37 Vict. c. 66); and no appeal from an order made upon such an application can be brought to the Court of Appeal.

Reg. v. *Barnardo* (23 Q. B. D. 305) distinguished.

APPEAL from an order of Butt, J., ordering a writ of attachment to issue against James Tuohy, for contempt of Court, unless he should pay a fine of 100*l.*

The contempt of Court consisted of the publication in a newspaper called the *Freeman's Journal,* of an article commenting on the conduct of Captain W. H. O'Shea, the petitioner in a pending action against his wife for dissolution of marriage. The newspaper was published and registered in Dublin, and Tuohy (the appellant) was the manager of the office of the newspaper in London.

On January 30, 1890, the petitioner served notice of motion for a writ of attachment against the appellant for contempt of Court. The notice was entitled in the suit of *O'Shea* v. *O'Shea and Parnell,* and also "in the matter of an application on behalf of W. H. O'Shea for a writ of attachment for contempt of Court, against J. Tuohy, for printing and publishing a certain article in the *Freeman's Journal* newspaper, on January 4, 1890, calculated to prejudice the petitioner in the eyes of the public and to disdiscredit him in the assertion of his right in this honourable Court."

The motion was heard on February 18, 1890, before Butt, J., when the learned judge held on the evidence that the appellant was in charge of the *Freeman's Journal* in London, and was responsible for the publication of the article in this country, and

1890

O'SHEA v. O'SHEA AND PARNELL.

ordered that a writ of attachment should issue against him unless he should within a fortnight pay a fine of 100*l.*, and directed him to pay the costs of the application as between solicitor and client.

S. Hall, Q.C., Asquith, Q.C., and *Roskill,* for the appellant. The appellant has been informed that a preliminary objection will be made to the appeal on the ground that the application for attachment was a criminal proceeding, and that under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47 (1), no appeal lies to the Court of Appeal. But, in *Reg.* v. *Barnardo* (2), it was held that an appeal would lie from an order for an attachment for disobedience to a writ of habeas corpus, the test being whether the cause or matter in which the order is made is in the nature of a criminal proceeding. The distinction is very clearly laid down in *Ex parte Alice Woodhall.* (3) In *In re Johnson* (4), and *Hunt v. Clarke* (5), it was taken for granted that attachment for contempt of Court in a civil proceeding was not a criminal matter, and an appeal was entertained; and in *Reg.* v. *Jordan* (6) it was not disputed that an appeal from an order of committal by a judge of a county court for an insult to the Court would lie.

Sir E. Clarke, S.G., L. Coward, and *Oxley,* (*Inderwick, Q.C.,* with them), for the petitioner in support of the preliminary objection. The question is not determined by the fact that the proceeding in respect of which the order is made is a civil proceeding or that it is not, for a contempt of Court in a civil proceeding may be of a criminal character: *In re Freston* (7), and in that case the attachment is of the nature of punishment for a crime, and an appeal from the order will not lie. In *In re Pollard* (8) the Privy Council held that contempt of Court is a criminal offence. The contempt of which the appellant was guilty was an indictable offence, for,

(1) The material portion of s. 47 is as follows:—

"No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th and 12th years of Her Majesty's reign."

(2) 23 Q. B. D. 305.
(3) 20 Q. B. D. 832.
(4) 20 Q. B. D. 68.
(5) 61 L. T. 343.
(6) 36 W. R. 589.
(7) 11 Q. B. D. 545.
(8) Law Rep. 2 C. P. 106.

although there has been no instance in modern times of an indictment being brought for such a contempt, it is laid down in old authorities—Hawkins' Pleas of the Crown (8th ed., vol. i. p. 63; vol. ii. p. 289); Russell on Crimes (5th ed., vol. i. p. 188); *Earl of Thanet's Case* (1)—that it is indictable. It is a misdemeanour at common law, and the proceeding by attachment is supplementary to the proceeding by indictment. No doubt there are two kinds of contempt of Court; when it is a mere disobedience of an order in the Court in a civil action it is not criminal, and then there may be an appeal; for in that case the attachment only issues to enforce the order in the civil action: *Reg.* v. *Barnardo.* (2) But here there has been an interference with the course of justice by a stranger to the suit, which is a high public injury: *Skipworth's Case.* (3) If an appeal were allowed in such a case, there might be an appeal from this Court to the House of Lords, and so much time would elapse that the attachment would be altogether useless.

[They also referred to the Rules of the Crown Office, 1886, rr. 261, 271, 272.]

Asquith, Q.C., in reply. Contempt of Court is not a criminal offence. There is no precedent of an indictment being brought for it, or of the offender being brought before a magistrate. If it were a criminal offence the writ might issue from any one of the superior Courts, but there is no instance of a writ issuing from any other Court but that in which the contempt was committed. The question is whether it comes within s. 47 of the Judicature Act, 1873. Is the order appealed from an order made by a judge "in a criminal cause or matter"? It was made in the cause of *O'Shea* v. *O'Shea and Parnell,* which is a civil cause; and the notice of motion and the order were so headed. It was a step in the proceedings in that cause. The contempt was not an insult to the judge or to the dignity of the Court; it was a private injury to the petitioner, whose rights in the cause were prejudiced by it, and the motion is made, not by the Attorney-General on behalf of the public, but by the petitioner. The observations of Lord Esher, M.R., in *Ex parte Woodhall* (4)

(1) State Trials, vol. xxvii. p. 822.
(2) 23 Q. B. D. 305.
(3) Law Rep. 9 Q. B. 230.
(4) 20 Q. B. D. 836.

1890

O'SHEA v. O'SHEA AND PARNELL.

are in our favour, for he held that the question was whether the subject-matter of the proceedings was criminal or civil.

COTTON, L.J. The question raised on this appeal has never yet, I believe, been decided, and as it is of considerable importance, and has been fully argued before us, I think we ought not to delay giving our decision. The appeal is from an order of Butt, J., which inflicted a fine of 100*l.* on the appellant, and in default of payment ordered an attachment. A preliminary objection has been taken to the appeal being heard, on the ground that by s. 47 of the Judicature Act, 1873, no appeal lies in such a case. The material part of that section is as follows: "And no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th and 12th years of Her Majesty's reign." Is then this a judgment "in a criminal cause or matter"? I think it is. Many motions, very like the motion in this case, have been made from time to time, but the point now raised does not appear to have been dealt with, although in one case which has been cited before the other branch of the Court of Appeal: *Reg.* v. *Jordan* (1), a doubt was expressed by one of the judges whether any appeal would lie in such a case; but the Court decided the case without hearing the point argued. The present proceeding is for a contempt of Court. Of course, there are many contempts of Court that are not of a criminal nature; for instance, when a man does not obey an order of the Court made in some civil proceeding, to do or to abstain from doing something—as where an injunction is granted in an action against a defendant, and he does not perform what he is ordered to perform, and then a motion is made to commit him for contempt—that is really only a procedure to get something done in the action, and has nothing of a criminal nature in it. But is that so here? No doubt the notice of motion is so entitled in the divorce suit, but it is also entitled in the matter of an application against Tuohy (the appellant), and the essential part of the motion is the application

(1) 57 L. J. (Q. B.) 483; W. N. (1888), p. 152.

to commit Tuohy for contempt. It is convenient that the notice should be entituled in the cause to shew to what matter the motion to commit refers; but what gives the Court the power to act is the fact that the appellant has done something to prevent the course of justice by preventing the divorce suit from being properly tried. That is clearly a contempt of Court of a criminal nature. Authorities have been cited which shew that everything done to prejudice the judge or jury in the trial of an action is a criminal act, because it is an attempt to prevent the course of justice. It is argued by the appellant that the act is complained of, not by the Attorney-General as a public wrong, but by the petitioner, who complains of it as a personal injury; but that makes no difference. It is conceded that it was a wrongful act, otherwise there could be no fine or imprisonment. And when you concede that it is a wrongful act, you find that, although it is headed in the divorce action, it is not a proceeding in the action—not a proceeding for the purpose of obtaining anything in the action, but an application to punish an attempt to induce the jury not to try the case properly, which is as much a criminal act as an attack upon the judge himself.

It is true that in some cases, as in *Reg.* v. *Barnardo* (1), where a motion to commit for contempt was made, the Court held that the proceeding did not come within the words "criminal matter" in s. 47. Much stress was naturally laid in the argument on what I said in that case. My words were: "Sect. 47 does not mean that no appeal shall lie when the act which originates the proceeding in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding." But what was the proceeding there? It was to obtain the doing of something in the civil proceeding before the Queen's Bench Division. That is what I referred to in my judgment in that case. But in the present case the whole proceeding is to punish the appellant for a wrong which he has done, and not to obtain the doing of anything for the petitioner's benefit in the action in the Divorce Division. It was a proceeding, therefore, entirely outside the divorce action, and its object was only to obtain that

(1) 23 Q. B. D. 305.

1890

O'SHEA v. O'SHEA AND PARNELL.

fair trial to which every suitor has a right. In my opinion, therefore, the Act of Parliament prevents us from hearing this appeal.

LINDLEY, L.J. I am also of opinion that we have no jurisdiction to hear this appeal. The question turns on the true construction of two sections of the Judicature Act, 1873, namely, ss. 19 and 47. [The Lord Justice read the sections, and continued:—] Does this case come within s. 19 or within s. 47? In my opinion it comes within s. 47. It is really an appeal from a summary conviction for a criminal offence. The offence of the appellant is certainly a criminal offence. I do not say that it is an indictable offence, but, whether indictable or not, it is a criminal offence, and it is an offence, and the only offence that I know of, which is punishable at common law by summary process. As regards the authorities, no case has been cited which conflicts with the view which we take on this appeal. In *Reg.* v. *Jordan* (1) the Court did not take the point now raised, and the parties did not wish it to be raised. But, after the appeal had been heard and judgment given, the point occurred to me, and I said I was not satisfied that we had any jurisdiction to hear the appeal. I am now satisfied that we had no jurisdiction to hear it. The case of *Reg.* v. *Barnardo* (2) is quite distinguishable from the present case.

There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such order but by attachment. We must not, therefore, be misled by the words "contempt" and attachment, but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies.

LOPES, L.J. The question raised before us is one of great importance, namely, whether the order for an attachment in this case is an order made in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873.

(1) 36 W. R. 797. (2) 23 Q. B. D. 305

There are different kinds of attachment for contempt. One kind of attachment is to enforce obedience to an order made in a civil action or proceeding, against one of the parties, in respect of something the doing or not doing of which is not a criminal act. That would not be an order in a "criminal cause or matter" within s. 47. The case of *Reg.* v. *Barnardo* (1) is an example of that kind. But there is another kind of attachment which is the subject of an independent application against a person who is not a party to the suit in respect of an act done outside the suit, and which act is criminal. That, I think, is within the words of s. 47. The application on which the present order was made was an application by the petitioner in the divorce action, in reference to an attempt made by a stranger to the suit to interfere with the administration of justice in the action, but it is made outside the action. The object of the application was to obtain the punishment of the appellant, and the proceeding ended with the order against him. I am clearly of opinion that this order was made in a criminal matter.

I will only add that, as to whether the offence was an indictable offence or not I desire to express no opinion.

Appeal dismissed.

Solicitors for the appellant: *Lewis & Lewis.*
Solicitors for the respondent: *Wontner & Sons.*

(1) 23 Q. B. D. 305.

M. W.

1890
Jan. 17.

[IN THE COURT OF APPEAL.]

BUTLER *v.* BUTLER.

BUTLER *v.* BUTLER AND BURNHAM (THE QUEEN'S PROCTOR INTERVENING).

Divorce—Collusion—Counter Petitions—Agreement between the parties—Queen's Proctor, Intervention of—Suppression of material Facts—Facts material to, though not sufficient to establish Counter-charge—Right to Decree Absolute—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), ss. 30, 31—*Matrimonial Causes Act,* 1860 (23 & 24 *Vict.* c. 144), s. 7.

A wife having petitioned for a divorce from her husband on the ground of his cruelty and adultery with several women, the husband presented a counter-petition on the ground of his wife's adultery. During the trial of the petitions, the husband and wife, by their respective solicitors, entered into an agreement that the wife should give evidence of cruelty to the satisfaction of the Court, and of the husband's adultery with W., one of the women charged, and that if the Court was satisfied on that evidence the decree should go, the wife should withdraw the other charges, and the husband should withdraw his petition. The wife's counsel proceeded with the trial as if the agreement had not been entered into; but the husband's counsel acted in accordance with instructions based on the agreement, and did not cross-examine the wife. The jury found that the husband had committed adultery with W. only, that he had been guilty of cruelty, and that the wife had not committed adultery.

On these findings a decree nisi was granted.

The Queen's Proctor intervened, and after a hearing at which further evidence was adduced, the judge left to the jury the questions (1) Were material facts withheld from the knowledge of the Court? (2) Was there collusion? (3) Did the wife commit adultery?

The jury answered the two first questions in the affirmative, but were unable to agree as to the third.

Held, first, that under the Matrimonial Causes Act, 1857, a wife was deprived of her right to a decree, not only if she had been guilty of a matrimonial offence, but also if her petition had been presented or prosecuted in collusion with the respondent; and secondly, that an agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts, which might have been adduced on the trial in support of a counter-charge, amounted to collusion, even though the facts suppressed might not have been sufficient to establish such counter-charge.

Alexandre v. *Alexandre* (L. R. 2 P. & D. 164) considered.

APPEAL from an order made by Butt, J., upon the intervention of the Queen's Proctor, rescinding a decree nisi for dissolution of marriage obtained by the wife.

The husband and wife were married before 1882. In 1882

they separated by mutual consent. In 1885 the wife gave birth to a child which was registered under the name of its supposed father, one Burnham.

In November, 1887, the wife presented a petition for the dissolution of her marriage with her husband upon the ground of his cruelty and adultery. The husband filed his answer, denying the charges against him, and also presented a counter petition for dissolution of the marriage upon the ground of his wife's adultery with Burnham. In her answer the wife denied the charge of adultery made against her, and made further charges of adultery against the husband, charging him altogether with adultery with four women.

The two suits were consolidated, and came on for trial before Butt, J., and a jury, and the examination of the wife was not concluded at the close of the first day. Before the second day of the trial the following agreement was entered into by the husband and wife, and was signed by them and their respective solicitors, the wife not being then represented by the firm now on the record:—

"Petitioner to give evidence of cruelty to satisfaction of Court, and of respondent's adultery with Miss W——, and if Court satisfied on that evidence decree for dissolution to go. Petitioner accepts her husband's denial as to adultery with Mrs. J——, and withdraws such charge, and, being satisfied that the witnesses who depose to adultery with S—— and S—— are mistaken as to identity, withdraws such charges.

"The husband's petition to be withdrawn.

"As to alimony, no application for same to be made, but the husband in lieu thereof to pay a lump sum of £150 to his wife. The deed of separation to be cancelled. The wife to maintain the child. The husband to pay the costs of the suit."

This agreement having come to the knowledge of the wife's counsel, they considered it as one upon which they ought not to act, and proceeded with the case as if it had not been entered into. The husband's counsel, on the other hand, acted in accordance with instructions from him based on the agreement.

Under these circumstances the trial resulted in findings by the jury—(1) That the husband had committed adultery with

1890

BUTLER v. BUTLER.

Miss W—— only; (2) that he had been guilty of cruelty; and (3) that the wife had not committed adultery with Burnham.

On these findings Butt, J., granted a decree nisi, but directed the papers in the case to be sent to the Queen's Proctor, who intervened, and pleaded that at the hearing material facts were withheld from the knowledge of the Court, and that the decree had been obtained by collusion between the husband and the wife. The husband and wife traversed the plea; and after a hearing, at which further evidence was gone into, Butt, J., left the following questions to the jury:—(1) Were material facts withheld from the knowledge of the Court? (2) Was there collusion? (3) Did the wife commit adultery with B.?

The jury found in the affirmative upon the two first issues, but were unable to agree upon the third. Butt, J., thereupon discharged the decree nisi, and the wife appealed.

Buszard, Q.C., and *Priestley* (with them, *Bargrave Deane*), for the wife. The main issue at the trial was whether the wife had committed adultery, and upon this the jury disagreed, and gave no finding. The Queen's Proctor has intervened upon the ground that material facts had not been brought before the Court, and the suppression of a material fact is no doubt sufficient to justify his intervention. But the fact must be material to the extent that, if it had been brought forward in the first instance, it would have disentitled the petitioner to a decree, and the Court cannot refuse to make a decree nisi absolute on the ground of the suppression of material facts, unless the facts are material evidence of the commission by the Petitioner of a matrimonial offence: *Alexandre* v. *Alexandre* (1). The facts kept back must be such as are contemplated as material by the Divorce Acts. It is sect. 7 of the Act of 1860 which empowers the Queen's Proctor to intervene, and the ground of his intervention must be, according to the words of the Act, "that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case;" and thereupon he may "intervene in the suit, alleging such case of collusion." The question then is, what is the meaning of "collusion"? The expression

(1) Law Rep. 2 P. & D. 164.

was defined in *Crewe* v. *Crewe* (1). Lord Stowell, in discussing by what objections, on proof of adultery, sentence may be debarred, and after mentioning "collusion" as one of them, says (2): "Collusion may exist without connivance, but connivance is, generally, collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury."

The material fact here was the wife's adultery, and it cannot have been intended by the legislature that a person who may be absolutely innocent of any matrimonial offence shall nevertheless be unable to get a divorce because he has not brought to the knowledge of the Court some prior matter or circumstance which did not amount to a matrimonial offence.

Lockwood, Q.C., and *Jaques*, for the Queen's Proctor, were not called upon.

[*Hunt* v. *Hunt* (3) and *Barnes* v. *Barnes* (4) were also referred to.]

COTTON, L.J. This is an appeal from a judgment of Butt, J., who, upon the intervention of the Queen's Proctor, and upon the findings of the jury, refused to make a decree absolute, and discharged the decree nisi.

I will not enter into the question as to what the learned Judge ought to have done when this agreement was brought before him, though I have some doubt as to whether he ought to have gone on with the case, or ought to have made any decree nisi after that fact was discovered; but he communicated with and sent the papers to the Queen's Proctor who intervened, and then there was a trial before a jury, who came to a conclusion to which I will refer presently. The ground of the Queen's Proctor's intervention was a strong suspicion, in the circumstances brought before him, that the decree was obtained by collusion and suppression of material facts. The petition of the wife charged her husband with cruelty, and adultery with four named persons;

(1) 3 Hagg. Eccl. Rep. 123.
(2) Page 129.
(3) 47 L. J. R. P. D. & A. p. 22.
(4) L. R. 1 P. & D. 505.

1890

BUTLER v. BUTLER.

Cotton, L.J.

and there was a counter-petition by the husband charging the wife with adultery with a particular person. After the case had gone on for one day, Saturday, and had been adjourned, on the Sunday the solicitors of the husband and wife met together and came to an agreement, which was in effect that the charge of adultery against the husband with three of the named persons should not be proceeded with, that the wife would bring forward such evidence as would satisfy the Court of his adultery with another of the named persons, and that the husband should not press the charge he made against his wife.

It is very true that the wife's counsel, when the agreement was brought to their notice on the Monday, saw the vice of it, refused to act upon it, and conducted the case as if no such agreement had been come to. But the husband did in fact act upon it, and did not support the charge he had made against the wife, and did not in any way cross-examine her. The result was that the jury found this—and it is a finding which is not altogether satisfactory—that, "As between Emma Butler, the petitioner, and Robert Butler, the respondent in the first-named suit, they were guilty of collusion together to withhold from the Court material facts." Then the jury did not find that the wife had not been guilty of adultery, but they came to no conclusion as to whether she had been guilty or not, and as to that issue there was no verdict at all. The question then is, was the finding of the jury sufficient to justify the conclusion at which the learned judge has arrived, and upon which he acted? I think it was.

Under sect. 7 of the Act of 1860 every decree for a divorce is first of all to be a decree nisi; then there is to be a certain time before it can be made absolute, and during that period, any person may in such manner as the Court directs shew cause why the decree should not be made absolute "by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court," and on cause being so shewn, the Court is to deal with the case as justice may require. Then it is further enacted that at any time during the progress of the cause or before the decree is made absolute, any person may give information to the Queen's Proctor of "any matter material to the decision of the case," and if from such information or other-

wise he "shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case," the Queen's Proctor may intervene, "alleging such case of collusion," and retain counsel and subpœna witnesses to prove it. Then certain directions are given as to the costs thus incurred.

It is argued here that the Court has no right to withhold a decree from the petitioner unless she has been found guilty of a matrimonial offence. But I do not at all understand that. It cannot be said here that she can obtain a decree nisi followed by a decree absolute if, under the original Act, of which this is a mere amendment in certain details, she could not obtain a decree nisi in the original suit.

To my mind, the 30th and 31st sections of the Act of 1857 conclude the question, and shew that the wife is not to be deprived of the decree simply and only in case it is found that she has during the marriage been guilty of adultery, but that the Court is prevented from making a decree in her favour if it has been found "that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents." That is, "collusion" will deprive a petitioner of a decree, independently of the question whether or not the Court finds that the petitioner has been guilty of a matrimonial offence. In either case the Act of Parliament prevents the Court from making a decree.

In my opinion it is very important that in every case brought before the Court the proceedings shall be fairly and properly taken, that all judgments shall be fairly obtained, and that the Court shall refuse to make a decree not only and merely where it finds that the facts suppressed might lead to the conclusion that a matrimonial offence has been committed, but also where it finds, as in this case, that the parties by an agreement between them have prevented material facts from being brought before the Court. Here, by agreement between the parties, the matter was not fully brought before the Court, and that is collusion. It is not necessary that the petition should be presented in

1890

BUTLER v. BUTLER.

Cotton, L.J.

collusion; it is enough if it is either presented or prosecuted in collusion.

It is said, however, that there is no collusion here, because the matters which were kept back from the Court were not facts which would lead to the conclusion that the wife had committed a matrimonial offence. Perhaps they would not; for the jury differed. But, in my opinion, in such a state of things, it is enough, if the parties have agreed together not to put before the Court material facts relevant to the issue which has to be tried.

Here the husband agreed with the wife that he would not support his charge against her, that he would not cross-examine her, and that he would withdraw his counter-charge. In my opinion, that was a suppression of material facts, and collusion.

It is said that *Alexandre* v. *Alexandre* (1) is inconsistent with that. We are not, however, bound by that decision, and if it does really lay down any such rule as is contended, I must, with every respect for the judge who decided that case, express my opinion that it is wrong; because I think there is collusion, independently of the question whether it is proved ultimately that the petitioner has committed a matrimonial offence, where the parties agree together not to bring before the Court facts which are relevant to the case, and which will enable the Court to decide one way or the other if brought before it. And here one can see that these facts were never properly submitted to the first jury, or put before them in such a way as they ought to have been by the husband when prosecuting his charge.

We cannot possibly surmise what that jury would have done, if the proper facts had been brought before them; but whether the petitioner ought, or ought not, to have been found guilty of the charge against her, there was collusion between the husband and wife as to the prosecution of the petition.

In my opinion, the judgment of Butt, J., was right, and the appeal fails.

LINDLEY, L.J. If we were to allow this appeal it appears to me that we should be doing that which would be a perfect scandal.

(1) Law Rep. 2 P. & D. 164.

The facts are very short. Mr. and Mrs. Butler were married some time before 1882; in 1882 they separated. In 1885 she had a child alleged to be illegitimate, and registered under the name of its supposed father, not her husband. Afterwards, in 1887, she sought in the Divorce Court for a dissolution of her marriage on the grounds of her husband's cruelty and adultery. He presented a cross-petition against her, alleging adultery with the person to whom I have alluded. In the course of the trial, during an adjournment, the solicitors for both sides meet; they sign an agreement to the effect that she shall prove just enough to get a divorce, and that he shall not object.

When this agreement was brought to the notice of the counsel for the wife he saw the difficulty, and he took the bold course of going on just as if it had not been entered into. The husband, however, did nothing of the kind; he acted upon the agreement; he did not oppose the divorce in any serious way, he did not adduce any witness in support of his counter-allegation, which he still believes to be true.

It is not that he withdrew the opposition on the ground that he had made a mistake—no such thing—but in pursuance of this arrangement he ceased to oppose his wife's petition, and under those circumstances a decree nisi was obtained. There is absence of material facts beyond all doubt or question. It is perfectly idle and absurd to suppose that the facts which we have to deal with, and which were withheld by the husband from the jury, were not material for the consideration of the jury who had to try the case. What view they would have taken of them I do not know. But the materiality of it does not depend upon that; it depends upon whether they might have taken a different view upon all the facts which ought to have been submitted to them; and if they might have done so then those facts were material.

Under those circumstances the decree nisi is obtained. In consideration of this agreement the learned judge sent the case to the Queen's Proctor, who intervened, and alleged that the decree nisi had been obtained by collusion. That was the issue for the jury, who found—that divers material facts were withheld from the consideration of the Court when the decree nisi

1890

BUTLER v. BUTLER.

Lindley, L.J.

was obtained; that the wife and husband on that occasion had been guilty of collusion together to withhold from the Court material facts, but they could not agree whether the wife was guilty of adultery or not. What their difficulty was I do not know; and now it is said that, as they could not agree as to that, their earlier finding, that there was collusion and a suppression of material facts, cannot be used to prevent the wife from having her decree made absolute.

I say that in my opinion it would be a perfect scandal if we allowed that contention to succeed. A plainer case of attempted imposition upon the part of the parties—I do not say by counsel—I cannot conceive.

The appeal ought to be dismissed with costs.

LOPES, L.J. The facts have been gone into upon the question of collusion. In my opinion, an agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts, which might have been adduced on the trial in evidence in support of a counter-charge against the respondent or co-respondent, amounts to collusion, even though the suppressed facts might not have been sufficient to have established the counter-charge. I believe that to be the correct definition of collusion as applicable to the circumstances of a case like this, and I believe also that definition to be strictly in accordance with *Hunt* v. *Hunt*. (1) Whether it is entirely in accord with *Alexandre* v. *Alexandre* (2) I do not express an opinion. But in point of fact I agree with what was said by my learned brother with regard to *Alexandre* v. *Alexandre*. (2) If it is intended to mean that which is suggested, I doubt very much if it is correct.

Applying the definition which I have just given to the present case, let us see how it stands. In this case there was a counter-charge of adultery made against the petitioner by the husband, the respondent, and issue was joined thereon. The husband and wife during the pendency of the trial, which, I believe, began on a Saturday, entered into this agreement on the Sunday, and what did they do by it? They agreed to withdraw from the jury the consideration of the issue whether or not the wife had

(1) 47 L. J. R. (N.S.) P. D. & A. 22. (2) L. R. 2 P. & D. 164.

committed adultery. If the wife had committed adultery, it must be remembered that she, the petitioner, would have been disentitled to the relief for which she prayed. To my mind, it is impossible to say that those circumstances do not bring this case within the definition that I have given. And this should also be observed—not only was that agreement come to, and I think that would have been sufficient, but that agreement was acted upon; because at the trial Mrs. Butler, the petitioner, was not cross-examined with regard to the alleged adultery by her, nor did the husband (no doubt in accordance with his agreement) give any substantive evidence, or any evidence in chief, or of any kind, to that effect.

Now what is the object of this special provision with regard to collusion? I think that its object is to compel the parties to come into the Court of Divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as to enable the Court to be in a position to do justice between the parties.

At the trial, when the Queen's Proctor intervened, the learned Judge left three questions to the jury, two of which related to the collusion; and the jury found both those questions in favour of the Queen's Proctor. But the learned judge left another question to the jury, and that was whether the petitioner, Emma Butler, had on divers occasions committed adultery. With all respect to the learned judge, I think that was an immaterial fact, and I think he was wrong in leaving that question to them. The question of collusion was an independent issue, and it was an issue which, found one way or the other, was sufficient to enable the judge either to rescind the decree nisi or make it absolute. I think, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Clinton & Co.; The Queen's Proctor.*

W. W. K.

1890
Feb. 7, 8.

BRINKLEY *v.* ATTORNEY-GENERAL.

Marriage—Foreign Law—Marriage between British Subject and Native of Japan—Monogamous Marriages—Legitimacy Declaration Act, 1858 (21 & 22 *Vict. c.* 93).

In a petition to establish the validity of a marriage under 21 & 22 Vict. c. 93, it appeared that the petitioner, who was a British subject with an Irish domicil of origin, and temporarily resident in Japan, had married a Japanese woman in Japan, according to the forms required by the law of the country.

Evidence having been adduced which shewed that the marriage was valid according to the law of Japan, and that by such a marriage the petitioner was precluded from marrying any other woman during the subsistence of the marriage:—

Held, that the marriage was valid in this country.

THIS was a petition under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), presented by Francis Brinkley, praying for a declaration of the validity of his marriage with Yasu Tanka, a Japanese woman, celebrated in Japan on March 25, 1886, according to the laws in force in that country. The petitioner, who is at present temporarily resident at Tokio in Japan, was a retired officer of the Royal Artillery, being a natural born subject of the Queen, and having his domicil in Ireland. He had cohabited with his wife in Japan ever since their marriage, and there had been one son issue of the marriage.

The Attorney-General had been cited, and had filed an answer traversing the petition.

Leave had been given on summons, with the consent of the Attorney-General, that the petitioner at the trial of the petition should be allowed to prove the facts by affidavits and certificates.

Mr. Brinkley's affidavit was as follows: "I was born on or about the 9th day of November, 1841, at Parsonstown, county Meath, Ireland, of parents then and there domiciled, and have since served Her Majesty as a captain in the Royal Artillery. I am now temporarily resident at Naka-Tokubendio-Tōkiō, in Japan; but have no intention of permanently residing there. On the 25th day of March, 1886, I was married in Japan to Yasu Tanaka, a subject of the empire of Japan. The certificates of my said marriage are now produced and shewn to me marked A,

and B, and the translations thereof, which I believe to be correct, are now produced and shewn to me marked C and D. I say that I am the petitioner in this suit, and I and the said Yasu Tanaka are respectively the same persons as 'Francis Brinkley, a British subject,' and Yasu Tanaka, of No. 20 of the 6th Ward of Jida Machi Kogimachi District, city of Tōkiō, named in the said certificate marked A, and the translation thereof marked C, now produced and shewn to me. I am advised and believe that my said marriage is valid according to the laws in force in Japan, and that I am thereby precluded from intermarrying with any other woman during the subsistence of the said marriage. I have since the said marriage cohabited with my said wife, and there is issue of my said marriage one son, born on the 25th day of March, 1887. There is no collusion or connivance between myself and any person other than my said wife."

The following certificates were also put in and read:—

"I certify that Yasu Tanaka, of No. 20 of the 6th Ward Jida-Machi, Kogimachi District, city of Tōkiō, was duly married according to the laws of this empire to Francis Brinkley, a British subject, on the 25th day in the 3rd of Mauh of the 19th year of Meiji (25th of March, 1886). (Signed) Ginbayashi Tsunao, Chief Secretary, Tōkiō City, Local Government, for Takasaki Garoku, Governor of Tōkiō City."

"I certify that the above certificate by Ginbayashi Tsunao, Chief Secretary of the Tōkiō City Government, representing Takasaki Garoku, Governor of Tōkiō City, is correct and legal. (Signed) Aoki Shinyo, Vice-Minister of State for Foreign Affairs, 10th day of 6th month of 19th year of Meiji (10th June, 1886)."

The following affidavit as to the marriage law of Japan and the validity of this particular marriage was also read:—

"I, Kazno Hatoyama, Chief Professor of Law in the Imperial University of Japan, solemnly declare and say as follows: 'I am the chief professor of law in the Imperial University of Japan, and am thoroughly acquainted with the law of marriage of the empire. I have read the affidavit of Francis Brinkley, sworn herein on the 2nd day of November, 1888, and am of opinion that the facts therein deposed do shew a valid marriage between the above-named petitioner, Francis Brinkley, and Yasu Tanaka, therein

1890

BRINKLEY v. ATTORNEY-GENERAL.

named, according to the laws of Japan, and that the said petitioner, Francis Brinkley, is thereby precluded from intermarrying with any other woman during the subsistence of the said marriage.'"

Bayford, Q.C., (*Melsheimer*, with him), for the petitioner. The principle established by the cases from *Warrender* v. *Warrender* (1) onwards is that this Court will recognize a marriage contracted abroad as valid if it has been solemnized according to the lex loci, and that applies just as much to a marriage in a heathen as in a Christian country. Whether a marriage has or has not been celebrated according to Christian laws has no bearing upon the question. The essential thing is the nature of the contract which we call marriage; that is what we look to when we speak of a Christian marriage. The term "Christian marriage" must be taken to mean a monogamous marriage—a marriage which prevents the man who enters into it from marrying any other woman while his wife continues alive. Such a marriage is valid wherever celebrated, if celebrated in accordance with the forms required by the lex loci. In *Hyde* v. *Hyde and Woodmansee* (2) Lord Penzance refused relief on the express ground that Mormon marriages are polygamous, although both parties were single at the time the marriage was contracted; and in *Bethell* v. *Hildyard* (3) the judgment of Stirling, J., proceeded on the ground that the marriage which Mr. Bethell intended to contract was not a marriage in the Christian sense, but a marriage in the sense in which the term was used among the Barolongs, which implies the power of taking another wife—that it was in fact a polygamous marriage.

[He referred also to *Johnson* v. *Johnson's Administrator* (4), *Connolly* v. *Woolrich* (5), and *Ardaseer Cursetjee* v. *Perozeboye.* (6)]

Gwynne James, for the Attorney-General. It may be conceded that upon proof that a marriage which has been celebrated in a country non-Christian according to the laws of such country is not polygamous in its nature, the Court may take cognizance of

(1) 2 Cl. & F. 488, at p. 530.
(2) Law Rep. 1 P. & M. 130.
(3) 38 Ch. D. 220.
(4) 30 Missouri State Rep. 72.
(5) 11 Low. Can. Jur. 197.
(6) 10 Moo. P. C. 419.

it and give relief under the Legitimacy Declaration Act. But before the petitioner's prayer is granted, especially as he has obtained leave to prove his case by affidavit, it is requisite that the case shall be strictly proved. It is submitted that the evidence here is insufficient. No independent proof has been given as to what constitutes a valid marriage in Japan; and there is no evidence as to what ceremony, if any, took place, whether in a temple or a registry office.

[THE PRESIDENT. You do not dispute that there would be a valid marriage if it were established that it was celebrated according to the law of Japan, and that it excluded the possibility of Mr. Brinkley marrying another wife while this marriage subsists.]

That is conceded; but it is submitted that there is not sufficient evidence of such a marriage having been celebrated.

John Frederick Lowder, a member of the English Bar, who had practised before the Japanese Courts and the Consular Courts for thirty years, was then called, and deposed as follows: "A civil marriage is contracted before the governor of the city in which the parties reside. He is the registrar, and the registration constitutes the marriage. The parties go before him, or somebody acting for him, and register their names as man and wife, and that is the whole ceremony. The certificates produced are the very best certificates that could be procured in Japan of the fact that the marriage took place. I recognize the names on the certificates. Ginbayashi Tsunao is the chief secretary of the governor of Tokio, and Takasaki Garoku is the governor of Tokio. They are known to me to hold those offices."

THE PRESIDENT. This case is clear from the difficulties which arose in the Mormon case and in the South African case, because in both those instances it was an attempt to establish as a valid marriage one which admitted of the possibility of a marriage with another person than the first spouse. The principle which has been laid down by those cases is that a marriage which is not that of one man and one woman, to the exclusion of all others, though it may pass by the name of a marriage, is not the status which the English law contemplates when dealing with the

1890

BRINKLEY v. ATTORNEY-GENERAL.

The President.

subject of marriage. But in this case it has been proved in the most satisfactory manner by the deposition of a Japanese professor of law, that by the law of Japan marriage does involve this, and that one man unites himself to one woman to the exclusion of all others. Therefore, though throughout the judgments that have been given on this subject, the phrase "Christian marriage," "marriage in Christendom," or some equivalent phrase, has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was this, that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned, and here it was proved that in Japan marriage is of that character. We all know that Japan has long taken its place among civilized nations, whose forms and laws and ceremonies are not to be treated as on the same footing with those of the Baralong tribe of South Africa. I have, therefore, come clearly to the conclusion that these cases do not apply, and that, as has been candidly admitted by Mr. James, a valid marriage can take place in Japan between an Englishman and a Japanese woman according to the law of Japan, which would be a valid marriage in this country and everywhere else. The only question, therefore, which remains is that which has been very properly raised by Mr. James, whether or not I have evidence before me that a valid marriage according to the law of Japan has been celebrated. Mr. Lowder has been called, who practised thirty years in Japan before the Japanese Courts. He has given satisfactory evidence upon the subject of the law. He states that the marriage is constituted by the persons obtaining from a particular officer, the governor or his deputy, a certificate that they had agreed to become man and wife. And I have before me that which purports to be a certificate from that officer. He certifies that those two persons were duly married according to the laws of the empire, and, of course, I must assume that things have been rightly done; indeed, Mr. Lowder has himself proved that the governor and his deputy, the secretary named here, are persons filling that office, and therefore would be competent to give a certificate to that effect. The evidence, therefore, does satisfy my mind that a valid marriage has been celebrated between these two persons.

I, therefore, pronounce the decree asked, that the marriage be declared valid.

1890

BRINKLEY v. ATTORNEY-GENERAL.

Solicitors for petitioner: *Bowman & Co.*
Solicitor for Attorney-General: *Sir A. K. Stephenson.*

W. L.

[IN THE COURT OF ARCHES.]

March 5; April 2.

BOROUGH *v.* COLLINS.

Ecclesiastical Law—Misconduct of Clerk—Conviction before Justices—Scandal—Suspension ab officio.

In a suit instituted in the Court of Arches against a clerk in orders, the articles alleged that he had been convicted before justices in petty sessions of having been drunk and riotous in a public place, and prayed that he might be punished for the scandal caused thereby. The respondent, by his plea, denied that he had been drunk and riotous, or that the conviction had caused scandal, alleged that it had been obtained by perjured evidence, and demanded a full inquiry into the facts. On motion to strike out this plea:—

Held, that the plea was no answer to the articles and could not be admitted, for the Court had jurisdiction to suspend a clerk ab officio on account of the scandal caused by the conviction without considering whether the offence charged had been actually committed.

MOTION to strike out a responsive plea except so far as it consisted of admissions. The promoter in his third article alleged that "the said George Collins (the respondent) was on October 2, 1889, before the Court of summary jurisdiction sitting at the Town Hall of Glossop, in the petty sessional division of Glossop, Derby, convicted for that he on August 30, 1889, at Charlesworth, Derby, unlawfully was drunk in a certain highway and public place there situate, and while so drunk was guilty of riotous and disorderly behaviour contrary to the statute, &c. Fourth. That in part supply of proof of the matters hereinbefore alleged and for all other lawful purposes herein, the said proctor annexes hereto and prays to be taken and read as part hereof a certain paper partly in print and partly in writing marked A, which paper is a record or extract of the aforesaid conviction duly made in pursuance of 34 & 35 Vict. c. 112, s. 18.

"Fifth. That the said George Collins mentioned in the said

1890

BOROUGH v. COLLINS.

record or extract of conviction and the respondent are one and the same person.

"Sixth. That the said George Collins by having been convicted as aforesaid and having thereby caused great scandal to the Church and his holy order, ought by the ecclesiastical laws, canons, and constitutions of England to be canonically punished and corrected."

The respondent, after some formal admissions, in the second paragraph of the responsive plea, admitted the conviction pleaded by the promoter, but stated that it was not alleged in any of the articles that he was drunk and riotous on August 30, 1889. In the third plea, the respondent averred that he was not in fact drunk or guilty of riotous conduct on the day in question. By the fourth plea he denied that the conviction had caused scandal to the Church and his holy order, as would appear on due inquiry. In the fifth plea, the respondent alleged that the conviction was based on perjured evidence; and by the sixth, that the scandal was caused by the person who had brought false charges against the respondent, and by his prayer he demanded a full inquiry.

A. B. Kempe, for the motion. The articles have been drawn in such a form as to avoid an inquiry into the facts of the conviction. The scandal necessarily arising from a conviction is sufficient ground for the interference of the Court: *Burder* v. —— (1); *Noble* v. *Holt* (2); *Slader* v. *Smalbrooke* (3); *Bishop of Lincoln* v. *Day* (4); *Dean of Jersey* v. *Rector of* —— (5); *In the Matter of A. B. Clerk.* (6)

Deane, for the respondent. The conviction was not for a felony, as was alleged in the case of *In the Matter of A. B. Clerk.* (6) There being various degrees of drunkenness, the Court should have all the facts before it, first to see if an offence has been committed, and next to consider the gravity of the offence if committed at all.

[LORD PENZANCE. I shall allow the motion; but I will put my

(1) 3 Curteis, 822.

(2) Before Lord Penzance, Chancery Court of York, Sept. 29, 1883, from report in *York Herald.*

(3) 1 Lev. 138.

(4) 4 Notes of Cases, 299, at p. 313.

(5) 3 Moo. P. C. 229, 245.

(6) 11 P. D. 56.

judgment into form, as the case is important, and deliver it on a future day.]

Deane, then applied for leave to withdraw the whole of his responsive plea, and to file one submitting to the judgment of the Court so that judgment on the case on its merits should be delivered without further proceedings.

[LORD PENZANCE. I will give judgment on the question raised by the motion and on the merits of the case at one and the same time.]

1890. April 2. LORD PENZANCE. The same question arises on both the articles and the plea in this case. It is a question of some importance, though by no means a new one. Has this Court the power, and if the power, then certainly the duty, to suspend or deprive a clergyman by reason of the scandal resulting from his conviction by magistrates of such an offence as drunkenness in public? It is obvious, I think, that such a conviction must degrade him in the eyes of his parishioners, and must seriously impair the efficacy of his spiritual advice and exhortations to a moral and religious life. If a clergyman should be convicted of an indictable offence by a criminal Court, a power must exist somewhere of removing him altogether from his spiritual functions, or of withdrawing him from them for a time, according to the nature and gravity of his offence. And similar reasoning, I think, applies, though in a less degree perhaps, to a conviction for drunkenness. If a power of this kind exists anywhere, it must reside, I think, in this Court, and be exercised in the familiar forms of suspension and deprivation. The comparatively brief period during which the judicial decisions of the Court of Arches have been reported and preserved renders it unlikely that the exercise of this power should have been often recorded; but authority is not wanting on the subject: the case of *Burder* v. —— (1) is a direct authority in point. The articles are not set out in the report of that case; but it is stated that the letters of request charged the defendant with immoralities, incontinence, lewdness, and practices, habits, and propensities causing great scandal to the Church. The articles

(1) 3 Curteis, 822.

1890

BOROUGH v. COLLINS.

Lord Penzance.

were objected to on the ground that the conduct thus charged constituted in fact criminal offences, and was not therefore examinable in the spiritual Court. The Court agreed with the principle involved in this argument, and if the suit had been framed in the ordinary way, invoking the censures of the Church pro salute animæ as a punishment for definite offences, it is plain from the judgment that these offences being of a criminal character the articles would not have been admitted. Instead of that, the Court held the articles admissible, taking this distinction—"that the Court has jurisdiction over clerks in holy orders for the purposes of suspension and deprivation. Although to a certain extent that may be punishment, still punishment is not the object of the proceeding. The object is to remove the party from the office in relation to which he has misconducted himself." Then, speaking of the misconduct imputed, the learned judge added, "It may have been mere report, but still it is a scandalous report, and it arises out of conduct." In this case, therefore, the scandal arose from evil report, based upon the immoral conduct of the respondent; while in the present case it arises from a conviction of misconduct by a competent tribunal; but the principle is the same in both cases. In both cases the Court is asked to exercise its power of suspension, not as a punishment for a definite offence, but as a means of withdrawing the offender for a time from the exercise of his spiritual functions, and thereby giving time for the evil impressions produced by his misconduct to subside in some degree or pass away. In support of his decision the learned judge had the authority of several cases which he cited from the Common Law Reports, and there can, I think, be no question but that the decision was a sound one and governs the present case. I hold, therefore, that the proposed plea is no answer to the articles and cannot be admitted; but, as I intimated at the hearing, the respondent must be permitted to withdraw his negative issue and give an affirmative one in its place. This he has now done, and the case is ripe for judgment. I may point out that cases like the present are very easily confounded with those cases in which the respondent is charged with conduct which in one aspect constitutes an ecclesiastical offence, punishable by the censures of

the Church pro salute animæ, and in another aspect is liable to the punishments inflicted by the criminal law. Cases of this sort often give rise to a question of a very broad and general character as to the extent to which the decisions or judgments of one Court are admissible evidence of the facts involved in them when tendered as evidence in another Court. There is much learning on this subject to be found in the notes to the *Duchess of Kingston's Case.* (1) But no question of this kind can properly arise here, for the respondent is not charged with drunkenness as an ecclesiastical offence, and the conviction by magistrates is not put forward as evidence or proof that he was in fact guilty of it. It was urged in argument that it was hard upon the respondent that he should be precluded from trying the question of drunkenness over again in this Court. If this is really a hardship, it may be borne in mind that in this respect he is only placed in the same position as members of other professions and callings are placed by the conviction in a competent Court of a degrading offence. An officer in the army or navy, if convicted of an indictable offence (say theft) in a criminal Court, could hardly claim with success to have the question of his guilt tried over again in a Court-martial. Members of the legal profession stand in a like position, and the same measure of justice is dealt out by the unwritten laws which regulate social life. It could hardly be otherwise, for mankind naturally give credence to the constituted Courts, and reputation is incurably damaged by their decisions, whether erroneous or not. It was also argued that if the respondent is to be punished in this Court for this alleged offence, he ought to be allowed to give evidence to shew the circumstances under which it was committed and the details and incidents connected with it, which might tend to extenuate or palliate it. This could hardly be done where the respondent denied the offence altogether, as he did in this case—a denial in which he persisted up to the time of the hearing. But a more cogent and a complete answer to this complaint lies in this—that the object of the suit is not the proof of drunkenness or the punishment for it; and the judgment of the Court must be guided by considerations which are wholly independent of the circumstances

(1) 2 Sm. L. C. 9th Ed. 812.

1890

BOROUGH v. COLLINS.

Lord Penzance.

under which the offence which the magistrates held proved and was punished was committed. The respondent must be suspended ab officio for a period of three months, and pay the costs of the suit. I cannot part with this case without remarking upon the inefficiency of these proceedings in reaching the end at which they are aimed. The removal of the offender from the exercise of his spiritual functions ought to follow promptly upon his conviction of the offence. A suit in this Court conducted in the ordinary way with the ordinary preliminary proceedings cannot effect this. The power of the bishop might be exercised in a summary way for the purpose. This, however, is for the legislature; in the meanwhile I will endeavour to frame a special form of practice for cases of this kind which may do something towards expedition.

Solicitors for promoter: *Lee, Bolton & Lee.*
Solicitor for respondent: *F. W. Biscoe.*

E. S. R.

1889
Dec. 6, 7.

[IN THE COURT OF APPEAL.]

THE DUKE OF BUCCLEUCH.

Ship—Collision—Lights—Infringement of Regulations for Preventing Collisions at Sea, art. 6—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.

In an action of collision it was proved that the lights carried by one of the vessels were so fixed as to be partially obscured, and that there was therefore an infringement of art. 6. of the Regulations:—

Held, by Butt, J., that, under the Merchant Shipping Act, 1873, s. 17, the vessel whose lights were thus obscured must be held to have been in fault, without any inquiry as to whether such obscuration could possibly have been a cause of the collision:

Held, by the Court of Appeal, reversing the decision of Butt, J., that, in the circumstances, it was the duty of the Court to inquire into the facts in order to ascertain whether the infringement of the Regulations could possibly have contributed to the collision, and that, inasmuch as it appeared from inquiry into the relative positions of the two vessels that the obscuration of the lights could not possibly have caused the accident, the vessel carrying such lights was not to blame.

APPEAL from a judgment of Butt, J., whereby he held the *Vandalia* and the *Duke of Buccleuch* to be both to blame for a collision between these two vessels, which took place about 1 A.M.

on March 7, 1889, in the English Channel. The *Duke of Buccleuch* was a steamer, and was lost, with all hands, in the collision. The *Vandalia* was a full-rigged sailing ship of 1422 tons register. The owners of both vessels appealed from the judgment of Butt, J.; but the appeal of the owners of the *Duke of Buccleuch* —the defendants in the action—was not proceeded with. At the hearing, the sole question was, whether the *Vandalia* was to blame under s. 17 (1) of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), for an infringement of Art. 6 (2) of the Regulations for Preventing of Collisions at Sea.

The following are the material parts of the judgment of

BUTT, J. On the early morning of March 7 last, the *Vandalia*, a ship of 1422 tons register, was in the neighbourhood of the Owers lightship, on a voyage from New York to London, laden with petroleum. The wind was strong from the S.S.E. to S. and by E., and she was sailing close hauled on the starboard tack, heading about E. ¾ S. magnetic, and making about seven knots an hour.

In these circumstances she was run into by a steamer, the *Duke of Buccleuch.*

Now, there was evidence which satisfied us that the *Vandalia* was sailing at the time in question in a general way as described, and that she had good regulation lights properly burning; but the conflict which has arisen is upon the question of whether those regulation lights were fixed in a proper position or no. If they were, it being the duty of the steamer to keep out of the

(1) Sect. 17: "If, in any case of collision, it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

(2) Art. 6: "A sailing ship under way or being towed shall carry the same lights as are provided by art. 3 for a steamship under way, with the exception of the white light, which she shall never carry."

By Art 3 (*b*) and 3 (*c*) the side lights are "to shew an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam."

1889

THE DUKE OF BUCCLEUCH.

Butt, J.

way, and the steamer not having done so, she must be held solely to blame. If they were not, other considerations arise.

Coming now to this case, I have had the advantage of a consultation with the Elder Brethren who have been down and inspected this ship. They tell me that, with the yards absolutely sharp braced, and without allowing for any bellying of the sails, the line of the light would shew outside the foresail, but that the line of the light is above the bottom of the foresail. That is the horizontal line of the light. They have no doubt that if the yards, instead of being sharp braced, were checked, or still more if they were square, the line of the light parallel with the keel of the vessel would be considerably inside the outer edge of the sail, and it would also be above the bottom of the sail. In other words, it would be seriously obscured from forward.

Now, assuming that the yards were absolutely sharp braced, I am advised that, apart from the bellying of the sail, there would be no obscuration of the lights even right ahead, but that it is impossible to say with a little bellying of the sail that obscuration may not have happened.

Two questions arise. First of all, are the owners of the *Vandalia* to be held to blame for this collision by virtue of the 17th section of the Merchant Shipping Act of 1873?

Now, it follows from what I have stated, that this ship was sent to sea with her lights so fixed as to be a distinct infringement of rule 6. Whether the infringement of the rule operated at the time in question is another matter; but I cannot hesitate to say, upon the advice I have received and upon the facts proved, that this ship was sent to sea with her side lights improperly placed, and I hold that there was not the slightest necessity for the lights being so placed.

How am I to apply that section of the Act of Parliament? It may be that if the yards were absolutely braced sharp up at the time the light would not have been obscured by the sail from ahead; and here let me say (I had forgotten to say it before) the Elder Brethren satisfied themselves that with the foresail carried as a mainsail that sail on the mainyard would cause no obstruction. It is the foresail proper of which I have been speaking and with which I have been dealing.

Am I to take it that this vessel had her yards absolutely sharp braced? I do not think I can. I think the Act of Parliament is passed to prevent my going into these nice questions of fact, and I think that the cases decided upon this section of the Act in the Privy Council and elsewhere have really gone upon that view, and that being so I must hold that at this time there was an infringement of Article 6 of the Regulations for Preventing Collisions at Sea, an infringement which "might possibly" (I am using the words, I think, which were used in the Privy Council and also in the Court of Appeal) "have contributed to or caused this collision."

That being so, I must hold the *Vandalia* to blame.

It is a totally different question which I have to consider now whether the violation of the rule did, as a matter of fact, cause the collision. I think it clear that if the evidence from the *Vandalia* is to be accepted as accurate, then there would have been no obscuration at all of her light from the approaching vessel, the *Duke of Buccleuch*, because the evidence was that they saw the *Duke of Buccleuch* at a bearing which they describe as a point to a point and a half on their bow. At that breadth of bearing there would be no obscuration. I am not quite certain that I am safe in taking that bearing—I doubt whether I ought to take it, but the Elder Brethren advise me of this: that, even from right ahead, in the then state of the weather and under the circumstances, the lights of the *Vandalia* must certainly have been visible under the foot of the sail as the vessel rose and fell in the seaway; and that therefore a vigilant look-out on the part of those on board the *Duke of Buccleuch* would have apprised them long before they came into dangerous proximity of the approach of this vessel.

I therefore hold that there was an infringement of art. 6, for which I must, under s. 17 of the Merchant Shipping Act, hold the *Vandalia* to blame. On the other hand, I hold it impossible to acquit those on board the *Duke of Buccleuch* from blame, inasmuch as upon any view we think they ought to—at intervals at all events—have seen the side lights of the *Vandalia*.

In the result, I must pronounce both of these vessels to blame.

1889

THE DUKE OF BUCCLEUCH.

Butt, J.

Cohen, Q.C., and *Myburgh, Q.C.* (*Raikes*, with them), for the plaintiffs. The obscuration of the lights of the *Vandalia* could not possibly under the circumstances of the case have contributed to the collision. This being the case, *The Fanny M. Carvill* (1) is an authority to shew that it was the duty of the learned judge in the Court below to have considered the facts, and to have found what was the real cause of the accident.

[They also referred to *The Khedive* (2) and *The Lapwing*. (3)]

Sir W. Phillimore, and *Barnes, Q.C.* (*F. Laing*, with them). The learned judge was right. When it was shewn that an infringement of art. 6 had taken place, he was not bound to carry the inquiry any further.

[They cited the *Fanny M. Carvill* (1), and also argued that upon the facts the collision might have been caused by the infringement in question.

Cohen, Q.C., in reply.

LORD ESHER, M.R. The law applicable to this case was laid down in *The Fanny M. Carvill.* (1) It has been suggested that that case has not, as to the point for which it must be used now, been approved by the House of Lords; but I think it has been approved as to the very point under discussion in the House of Lords. That tribunal has expressed approval of it as a whole; but whether that is so or not, I am of opinion that I should, even without the authority of the House of Lords, adopt the judgment in the case of *The Fanny M. Carvill.* (1) I think that the decision was a wholesome one, and one which such judges as those who decided that case must inevitably have come to. They could not construe the stringent rule literally, for if they did, it led to manifest absurdities. If they did not construe it literally, I think their rule of construction was correct; they say, "We must construe it as nearly as possible literally; we must construe it as strictly as it will bear, so as not to lead to the absurdities which have been pointed out; short of that it must be construed to its full extent." Then, the rule laid down is thus stated: "Their Lordships are so far from dissenting from

(1) 13 App. Cas. 455, n. (2) 5 App. Cas. 876.
(3) 7 App. Cas. 512.

this finding that they are prepared to give effect to what is directly expressed by it, and to hold, on the evidence before them and for the reasons next to be stated, that in the circumstances in which these vessels were placed, the green light of the *Peru* could not by any possibility have been seen by those on board the *Fanny M. Carvill.*" (1) Now, that is not laying down the rule, but it is assuming the rule. But afterwards, in the course of the case, they say: "They conceive that the legislature intended at least to obviate the necessity for the determination of this question of fact, often a very nice one, upon conflicting evidence." And then they say that "the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision." They lay down the rule at the end. "It gives effect to the statute by excluding proof that an infringement that might have contributed to a collision did not in fact do it, and by throwing on the party guilty of the infringement the burden of shewing that it could not possibly have done so." I take it that that case, therefore, decides this, that if it can be shewn that a vessel—I will speak only of lights—has her lights not perfect according to the rule—if you can shew that there is a defect in the lights, that vessel must be held to blame unless she can prove that the defect which existed in her lights could not by any possibility have contributed to the collision. The whole burden of proof lies upon her; but the Court must try the question, namely, whether the defect, which is an admitted fact, could by any possibility have contributed to the collision. That may sometimes be a very easy point to decide, for if the approaching vessel is always well on the port side of another ship, and the defect which exists in her lights is only on the starboard side—in the green light—it does not take a moment's consideration to shew that that defect in the green light could not by any possibility have contributed to the collision, by the vessel always approaching on the port side. That is easy. The circumstances in *The Fanny M. Carvill* (1) were still more absurd. That is to say, if you construe the Act of Parliament strictly, it would lead to this absurdity, that if a ship has not a foghorn on board which would be of use in a fog, therefore.

(1) 13 App. Cas. 455, n.

1889

THE DUKE OF BUCCLEUCH.

Lord Esher, M.R.

if a collision takes place in broad sunlight and daylight, the absence of the foghorn is to cause the Court to say she was in the wrong in respect of the collision. These are easy cases; but let us take a less easy case. Suppose that the defect in the light is one which will obscure the full force of the light to a vessel approaching end on, or nearly end on, but will not have any effect in obscuring the light in the slightest degree to a vessel which is coming on the beam of the other vessel towards her. If that is made out, it is as clear as the other two cases that the defect in the light which is thus assumed could not by any possibility affect the collision which then takes place. But supposing then that is the state of things alleged, what must the Court find? There may be a dispute of evidence as to whether the other ship is coming up on the beam. If at the end of the case the evidence leaves the Court in doubt whether the other ship was coming up on the beam or not, then the vessel which has its lights defective has failed to discharge the burden of proof. She has not shewn that the defect in her light could not by any possibility have affected the collision, because if there is any doubt whether the other vessel was coming towards her nearly stem on, then there is still a doubt whether the defect in the lights may not have affected the collision. Therefore, if the evidence leaves it in doubt as to the position of the ships, the burden of proof is not satisfied. But if there is a conflict of evidence, if in the result the Court comes to a clear conclusion, and the Court is satisfied that the truth is, that the vessel was coming towards the other on the beam, and that the defect in the mode of fixing the light would only obscure the light to a vessel coming one point or two points on the bow, then if the Court is satisfied that the vessel was approaching in that way the burden of proof is satisfied, because the vessel on whom the burden of proof lies has then proved to the satisfaction of the Court beyond reasonable doubt that the defect in the light could not have had any effect at all on the collision.

There is a dispute as to the way in which she is approaching, and the evidence of the way in which she is approaching on the one side will make it clear that the defect cannot possibly have any effect on the collision, and the evidence on the other will

shew that it can, then the Court must try the question of how the ship was approaching. If, again, the Court is in any doubt at all, the ship which has her lights wrong fails in the burden of proof. But again, though there is a conflict of evidence, if the Court, after having heard the whole, comes to a clear conclusion that they were so approaching that the defect in the lights could not possibly have had any effect, the Court must say so, and the defect in the lights, as in the case of *The Fanny M. Carvill* (1), becomes immaterial. Therefore, I say the burden of proof lies on the ship whose lights are first shewn to be defective, and she must satisfy the Court clearly, and if she leaves it in doubt she has failed in the burden of proof. Apply this law to the present case. There is a defect in the light. If there had been any doubt as to the amount of that defect, then we must have taken the worst possible view of it. If it had been in doubt whether the obscuration would take place at half a point, or at two and a half points, we must have taken it against her. If there appears to be a doubt about it, we must take it that it would obscure the light at two and a half points off. But here we have had, not the evidence merely of witnesses, but of the assessors of the Admiralty Court, who viewed the vessel, and had the sails set on her. They came to the conclusion, that if the sails of that vessel were braced absolutely sharp, there would be no obscuration of the light at all, even if the other ship was straight ahead; but that if the sails were not braced absolutely sharp, or if there was a varying of the sails to any amount which might in some circumstances take place, there was then no continuous obscuration of lights; there was only a casual and occasional obscuration of light to a ship coming end on or nearly end on, and the obscuration of the lights would only take place if the ship were not sailing on a perfectly even keel, but was going down and coming up again, not rolling, so that at that time it would be obscured for a short moment of time by the sail—not wholly obscured then, but partially obscured. But a vessel coming end on to another vessel has a right to have the whole value of the light continuously in sight during the time she is called upon to act, and if therefore a vessel were coming end on, or anything like end on,

(1) 13 App. Cas. 455, n.

1889

THE DUKE OF BUCCLEUCH.

Lord Esher, M.R.

towards this ship the *Vandalia*, the question would not be whether the partial obscuration of the light, even for that time, and to that extent, would prevent her from seeing it. The question would be, whether it might not prevent her seeing it during some of the time during which she would act, and so have an effect on her conduct. If that were so, and that were all those on board the *Vandalia* could prove, then they would fail, because you could not say, that by no possibility could that have any effect on the conduct of the other vessel. Our assessors, by their measurements and calculations, have arrived at the same conclusion as the assessors in the Court below. Then are we satisfied that these vessels were so approaching each other that such an obscuration as is proved could not possibly have affected the conduct of the steamer on this occasion, and under these circumstances? That depends on how this steamer was approaching the *Vandalia*. [The Master of the Rolls then examined the evidence on this point.] I therefore come to the conclusion that the *Duke of Buccleuch* never was ahead of the *Vandalia*—and when I say ahead, I do not mean to try the case upon a quarter of a point or half a point. I say she never could have been within a point and a half of being ahead of her. Now, she was coming out shewing her green light. These officers, whom I believe to have been carefully watching her, say that the light did not change. The only thing which could prevent it from changing must have been that this steamer was starboarding sooner than she did when they saw her. She must have been starboarding even before they saw her. If she was, and if she was coming towards the other ship, and the other going on, it may be that the lights would remain as they were; otherwise I should have thought the angle would have been lessened. I incline to the opinion, therefore, that the steamer was broader than a point and a half at one time, and that as she came towards the other vessel lessening the angle it was lessening it from more than a point to a point and a half. I feel certain that she never was at a less angle to this vessel than a point and a half. I take it that it was nearer a point and a half than a point. Now, we have got this, that the obscuration of the light can only affect a vessel which is nearly ahead, or quite ahead, and that the obscuration of the light could not possibly

have any effect on a vessel which was approaching at a point and a half, and that the steamer was never less than a point and a half. Therefore the defect of the light could not possibly have had any effect in diminishing the light of the *Vandalia* towards a vessel which was approaching her, as the steamer was. If that is so, the case of *The Fanny M. Carvill* (1) applies. Those on whom the whole burden of proof rested have made out each and every point which it is necessary to establish. Therefore, I think that the defect in the light is not in this case to be deemed a fault on the part of the *Vandalia*, as I am convinced that it never had any effect at all on the collision. Where I differ from Butt, J., is in this respect, that I think he has narrowed the case too much from the case of *The Fanny M. Carvill* (1), that he came to the conclusion that he ought not to inquire into the position of the vessels in order to determine this question. I think he was bound to inquire, and that if he had inquired he would have come to the same conclusion as we do. Therefore, the point of law on which I differ from him is this. He said he ought not to inquire into the position of the vessels. I think he ought. I have endeavoured to shew that the whole burden of proof rests on the vessel whose lights were defective; that they must prove that it was not possible that in this case they could have any effect on the collision. I think they have satisfied that burden, and therefore I think the *Vandalia* was not to blame. If the defect in her light could have had no effect in obscuring her light from the steamer, it is clear that the steamer was solely to blame. The judgment of the Admiralty Division must be varied, and the finding must be, that the steamer was solely to blame for this collision.

LINDLEY, L.J. There are three questions in this case, two of fact and one of law. The first is, whether art. 6 has been infringed. That, of course, depends upon the wording of the rule, and upon the evidence relating to the red light. It must be taken from the report of those skilled gentlemen who examined the ship, and, as I understood their report, it comes to this—that in certain circumstances that red light would be, or might be,

(1) 13 App. Cas. 455, n.

1889

THE DUKE OF BUCCLEUCH.

Lindley, L.J.

obscured by the sails in the ordinary course of navigation—not always, but sometimes. If that is the true fact, then it appears to me to follow that the rule about the red light has been infringed. Unless that foundation is laid there is no room for applying the 17th section of the Merchant Shipping Act, 1873, but when you get it as a fact that the red light was not what it ought to be, was not so fixed as to give that kind of unbroken light which is required by the rules, then arises the question, what is the legal consequence of that? That question of law appears to be settled in the case of *The Fanny M. Carvill.* (1) You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the legislature, in this case any more than any other case, a meaning that would not only carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its objects, and the construction put on the 17th section by the Privy Council in this case is based, in my opinion, on the soundest principles. Having got so far, we must consider the second question, which is the question of fact. Could a departure from the normal rule as to lights in this case have had any effect at all upon this collision? It is for the ship to prove that it could not—a very difficult burden sometimes to discharge, and sometimes a very easy one, as in the cases put by the Master of the Rolls. But, under certain circumstances, the burden mentioned by the Privy Council becomes very difficult, and in some cases impossible. In this case it is not impossible. In the first place, to investigate the question of fact, you must ascertain where the ships were, what they were doing, and what the surrounding circumstances were. Now, having regard to the fact that all the evidence comes from one side in this case, it is necessary to be very cautious. It is not necessary or right to disbelieve witnesses simply because you cannot contradict them, but it is right to look at their testimony with care. Now, it appears to me to be established that this steamer was at least a point or a point and a half on the port bow of the sailing ship. I do not believe that it is credible that it could have been less, consider-

(1) 13 App. Cas. 455, n.

ing the other evidence in the case; for if it had, I am satisfied she would be a crossing ship. If once you get at that, that the steamer never was narrower on the bow of the sailing ship than I have said, it follows necessarily that the defect in the light could not possibly have had any effect on the collision. Under these circumstances, it appears to me the appeal of the *Vandalia* ought to succeed, and that the steamer must be held alone to blame.

LOPES, L.J. The object of 36 & 37 Vict. c. 85, s. 17, is to enforce the observance of the regulations; but if the regulation which has been infringed is one which has no possible connection with the mischief, and could not by any possibility have contributed to it, then the section does not apply. That, as I understand, is the decision in *The Fanny M. Carvill.* (1) I can only say, that I entirely agree with that decision, and the law there laid down. I think it sound, reasonable, and right. Now apply that to the present case. In the first place, there are certain facts to be determined in order that you may apply it, and the Court has to inquire into and determine the particular facts in each case, and to consider the surrounding circumstances. In the present case, the Court has specially to consider and inquire into the relative positions of these vessels. I am of opinion, and we are advised, that the green light of the steamer was at least a point or a point and a half on the port side of the *Vandalia*, and if it was so, it appears to me, that by no possibility could there be any obscuration of the light of the *Vandalia*. Under these circumstances, therefore, I agree with the rest of the Court that the steamer was solely to blame.

Appeal allowed.

Solicitors for plaintiffs: *T. Cooper & Co.*

Solicitors for defendants: *Gellatly, Son & Warton.*

(1) 13 App. Cas. 455, n.

E. S. R.

1890
March 13.

THE CARISBROOK.

Ship—Charterparty—Demurrage—Place of Unloading.

By the terms of a charterparty the ship was to load a cargo of coals at Glasgow, and therewith "proceed to Odessa, or so near thereto as she might safely get, and deliver the same to the said freighters or assigns alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by receiver. Cargo to be discharged at the average rate of not less than 330 tons per working day, Sundays and holidays excepted, and ten days on demurrage over and above the said lay days at 16*s.* 8*d.* per hour, except, &c. Time for loading and unloading to commence from the time the steamer is ready, and intimation has been given in writing." The ship arrived at Odessa on November 16. Due notice was given on the same day of her readiness to discharge cargo, and she was ordered to discharge alongside the wharf or quay, which was the usual place for the discharge of coal cargoes at Odessa. She did not get alongside the quay till November 20, the berths being occupied. In an action for demurrage:—

Held, that the time for discharging commenced from the time when intimation of the ship's readiness to discharge in the port was given, and not from the time of her arrival alongside the quay.

Davies v. *M'Veagh* (4 Ex. D. 265) followed.

Murphy v. *Coffin* (12 Q. B. D. 87) dissented from.

ACTION in personam for demurrage.

The action was brought in the City of London Court, but was transferred to the High Court under the County Court Act, 1868 (31 & 32 Vict. c. 71), s. 8.

The plaintiffs were the owners of the steamer *Carisbrook*, and the defendants were the charterers. By a charterparty made on October 11, 1888, the *Carisbrook* was to load a cargo of coals at Glasgow from the charterers' agents, and being so loaded should therewith "proceed to Odessa, or so near thereunto as she might safely get, and deliver the same to the said freighters or assigns alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by receiver."

There was a further clause as follows: "Cargo is to be discharged at the average rate of not less than 300 tons per working day. Sundays and holidays excepted, and ten days on demurrage over and above the said lay days at 16*s.* 8*d.* per hour, except in cases of strikes, lock-outs, colliery holidays, strikes at mines where steamer is booked, detention by railway, stoppage of trains,

accidents to machinery, or any other causes beyond the control of the charterers or receivers, or their respective agents, delaying the due loading or unloading. Time for loading and unloading to commence from the time the steamer is ready, and intimation has been given in writing. Charterers' responsibility to cease after the shipment of the cargo and demurrage in loading paid, if any, the owners having a lien on cargo for freight, dead freight, demurrage, and all other charges."

The material facts are set out in the following, among other agreed admissions of fact:—

The *Carisbrook* arrived at Odessa laden with the said cargo at 9.15 A.M. on Friday, November 16, and came to anchor within the mole, but not in any usual discharging berth, and at noon due notice of the ship's readiness to discharge cargo was given to the defendants. The ship was ordered by the defendants to proceed alongside the wharf or quay to discharge (where she afterwards did discharge). The wharf or quay was the usual place for the discharge of coal cargoes at Odessa. At 11 A.M. of November 20 the *Carisbrook* got alongside the quay. It was impossible to get there earlier, as she had to wait her turn before the harbour officials permitted her to go to the quay. The defendants knew when they gave such orders that all the berths of the quay were occupied; but there was no other place of discharge for coal cargoes at Odessa, and there were no lighters available. The cargo was all discharged at 3.30 P.M. on Sunday, November 25, 1888.

The plaintiffs alleged that the time for discharging commenced from the time when notice of readiness to discharge was given on October 16; the defendants, on the other hand, alleged that it was from the arrival of the steamer alongside the wharf.

Robson, for the plaintiffs, having stated the facts,

BUTT, J., called on

Pyke, for the defendants. According to the terms of the charterparty, this vessel would not be deemed to have arrived until she had obtained a loading berth: *Murphy* v. *Coffin*. (1)

(1) 12 Q. B. D. 87.

1890

THE CARISBROOK.

No doubt, according to *Davies* v. *M'Veagh* (1), the time of arrival would be when the vessel arrived in the port; but that decision has been declared to be erroneous in *Murphy* v. *Coffin*. (2) *Pyman* v. *Dreyfus* (3) is distinguishable from *Murphy* v. *Coffin*. (2) Secondly, the vessel had not arrived within the meaning of the charterparty till she had reached some usual place for discharging: *Nelson* v. *Dahl* (4); and this had not happened till she reached the quay. Thirdly, she was prevented from arriving at the quay by a cause beyond the control of the charterers.

BUTT, J. I have no doubt that the charterers are liable for the claim in this action. The ship having arrived at Odessa, was ready to deliver her cargo at any place where she could be unloaded by lighters in that port. But the charterers chose to exercise the option given to them by the charterparty, and ordered her to a quay which was crowded with vessels, and to which she could not get at the time. The charterers had a perfect right to take this course, but they are liable in consequence to pay demurrage. This was clearly laid down by Brett, L.J., and other learned judges in *Nelson* v. *Dahl*. (4) The case of *Davies* v. *M'Veagh* (1) appears to me to be in point. But I am asked on the authority of *Murphy* v. *Coffin* (2) to treat it as of no value. The judges who decided *Murphy* v. *Coffin* (2) say that *Davies* v. *M'Veagh* (1) is wrong, because it is inconsistent with other cases, and because the attention of the Court was not called to the true place of the vessel's destination. I cannot take that view. I think the Court of Appeal quite appreciated the facts of the case. I feel bound by the decision, and, furthermore, it is, in my opinion, sound.

I, therefore, give judgment for the plaintiffs.

Solicitors for plaintiffs: *Turnbull, Tilly, & Mousir.*
Solicitors for defendants: *T. Cooper & Co.*

(1) 4 Ex. D. 265.
(2) 12 Q. B. D. 87.
(3) 24 Q. B. D. 152.
(4) 12 Ch. D. 568.

E. S. R.

[DIVISIONAL COURT.]

1890
April 23.

THE MAGNETA.

Ship—Collision—Humber Rules, No. 2—Height of Light.

By rule 2 of the Humber Rules, a vessel with two masts at anchor in the Humber shall exhibit an after-riding light "double the height of the bow light":—

Held, that the rule must be taken to mean that the after light shall be at least double the height of the bow light, but that it need not be exactly double the height of such light, and that a vessel carrying an after light of a height five feet more than double that of the bow light had not infringed the rule.

BENGAL SECRETARIAT LIBRARY

APPEAL from a judgment of the judge of the County Court of Yorkshire, holden at Kingston-upon-Hull, whereby he held certain barges and the steam trawler *Magneta* to blame for a collision between them, the subject of the action.

The appellants were the owners of the *Magneta*, and the question raised by the appeal was whether that vessel was to blame for a breach of rule 2 of the Rules for the Navigation of the River Humber, which was as follows: "All vessels, as aforesaid, when at anchor in the River Humber, or in any part of the River Ouse, below the North Eastern Railway bridge crossing the River Trent, at or below Gainsborough, shall, between sunset and sunrise, instead of the light prescribed by article 8 of the said regulations, exhibit from the forestay, or otherwise near the bow of the vessel, where it can be best seen, a white light in a globular lantern of eight inches in diameter, and so constructed as to shew a clear, uniform, and unbroken light, visible all round the horizon at a distance of at least one mile; and in addition thereto, all vessels having two or more masts, shall exhibit another white light at double the height of the bow light, at the main or mizzen peak, or the boom topping lift, or other position near the stern where it can best be seen."

The *Magneta* was at anchor in the Hull Roads; the bow light was placed about ten feet from the deck, the after light was about twenty-five feet from the deck. The learned judge held that there had been an infringement of the above regulation since the after light was more than double the height of the bow light

1890

THE MAGNETA

from the deck, and that the *Magneta* by such infringement was to blame for the collision.

Sir W. Phillimore, (*Pyke*, with him), for the appellants. The rule only intends that the minimum height of the after light shall be double the height of the bow light. Secondly, the rule intends the height to be calculated from the water. Therefore the *Magneta* was not in fault. [He referred to *The Vera Cruz.* (1)]

Aspinall, for the respondents. The rule must be construed according to its plain meaning—that is, that the height of the after light shall be exactly double that of the fore light measured from the deck. [He also contended that the facts shewed that the light was from time to time obscured by smoke from the funnel.]

THE PRESIDENT. A point has been raised which was not considered in the Court below as regards the after light not being placed in a position where it could be properly seen owing to the smoke from the funnel. But it is impossible to say that the light may not be placed in a particular position, and it is not established in fact that it was obscured by smoke. As regards the more important point as to the construction of rule 2 of the Humber Rules, it is remarkable that the words "above the hull," which appear in article 8 of the Regulations for Preventing Collisions at Sea are omitted in this rule, thus leaving the datum line uncertain. There is much to be said in favour of the water being the datum line; but it is unnecessary to express an opinion as to that, because I am of opinion that the meaning of the rule is, not that the after light shall be placed exactly double the height of the fore light, but that it shall be at least double. To say that it must be exactly double would be a ridiculous construction, because a somewhat greater height would make no difference for purposes of navigation.

Has there, then, been a substantial compliance with the rule? Of course, the light might be placed so much in excess of the double that the rule would not be complied with. But that is not the case here, and I, therefore, think there has been no

(1) 9 P. D. 88.

breach of the rule in question, and that this appeal must be allowed.

BUTT, J. I am of the same opinion.

Solicitors for appellants: *Bell, Brodrick, & Gray, for J. T. & H. Woodhouse, Hull.*

Solicitors for respondents: *Pritchard & Sons, for A. M. Jackson, Hull.*

E. S. R.

THE CORIOLANUS.

April 25.

Salvage—Passengers—Cattle-keepers.

A steamer having on board a cargo of cattle in charge of a number of men who were paid by the owners of the cattle, but who were nominally on the ship's books, fell in with a derelict ship in the Atlantic and towed her to Queenstown. The service caused the voyage to be a day and three quarters longer than it would otherwise have been, but the keepers of the cattle did not assist in the service in any way:—

Held, that they were not entitled to participate in the remuneration payable for the salvage service.

ACTION of salvage. The plaintiffs were the owners, master, and crew of the steamship *Bostonian*, and eighteen cattle-men on board this ship. The *Bostonian* was a steamer of 2925 tons net, having a cargo on board which included 600 head of live cattle in charge of the above men. The latter were paid a lump sum for the voyage by the owners of the cattle, but were nominally on the ship's articles at a nominal rate of payment of one shilling each for the voyage. They were fed on the voyage by the owners of the steamer. The *Bostonian* came up with the sailing ship *Coriolanus*, which had been abandoned by her crew in the Atlantic; the *Bostonian* towed the ship to Queenstown, the service lasting about four days; the first officer, the carpenter, and some seamen had before the towage begun been put on board the *Coriolanus*; the service was one of difficulty and merit. The agreed value of the *Coriolanus* and her cargo was 13,000*l.*

Sir W. Phillimore, and *Aspinall*, for the owners, master, and crew of the *Bostonian*.

1890

THE CORIOLANUS.

Manisty, for the cattle-men. The claimants are entitled to share in any salvage which may be awarded: they are part of the crew of the sailing ship. They have also in consequence of the service been delayed a day and three quarters on the voyage. If they are to be considered as passengers, the inconvenience which they have suffered gives them a right to salvage, though they may have done no actual work: *The Hope*. (1)

Myburgh, Q.C., and *Raikes*, for the defendants.

Sir W. Phillimore, and *Aspinall*, for the principal plaintiffs. The claim of the cattle-men cannot be maintained. They have done no actual service. Passengers who have not assisted in the service are not entitled to salvage. [They referred to *The Salacia* (2); *The Branston* (3), and *Bond* v. *The Brig Cora*. (4)]

THE PRESIDENT. I have thought the question raised by Mr. Manisty so important that I have deemed it advisable to consult my brother Butt before giving judgment. We are of opinion that this is not a case in which any salvage should be awarded to the cattle-men on board the *Bostonian*. They have no claim to rank as salvors, because they did nothing towards saving the property in danger, and they were only nominally on the ship's books. It would be a mockery to allow them to share in the salvage reward in proportion to the amount paid to them according to the books, viz., one shilling each. It has been argued that they are entitled to salvage being passengers, but it is necessary for this purpose that persons in the position of passengers should have assisted in the service. Here these men have not done so; they have only suffered the inconvenience of being delayed on the voyage for a day and three quarters. In *The Hope* (1) the claim was put forward generally on behalf of the crew and passengers. The judge was only asked in that case to say how much he would give the passengers who had been allowed by the crew to come in and claim, and whose claim had not been opposed. Therefore, we do not think that that case is any authority in the present case, and, on the ground that the cattle-men have not contributed to the service, their claim must be rejected.

(1) 3 Hagg. 423.
(2) 2 Hagg. 269.
(3) 2 Hagg. 3, n.
(4) 2 Washington, 80.

[THE PRESIDENT then considered the other parts of the case and awarded the salvors 5000*l.*]

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co.*

Solicitors for defendants: *Waltons, Bubb & Johnson.*

E. S. R.

MILNES *v.* FODEN.

Feb. 17; *March* 7.

Will—Ante-nuptial Settlement—Power of Appointment exercised by revocable Deeds-Poll—Probate.

A testatrix, in contemplation of her marriage, settled her property upon such trusts as she should by revocable deed or by will appoint. In 1884 she duly executed a will which did not expressly include this property, and in 1887 and 1889 she executed two revocable deeds-poll, which were duly attested by two witnesses, whereby she appointed the settled property upon certain trusts from and after her decease:—

Held, that the deeds were testamentary instruments and entitled to probate, as, together with the will of 1884, constituting the last will of the deceased.

THE plaintiff, as executor of Melicent Caroline Volbracht, deceased, propounded a will, dated April 3, 1884, and two revocable deeds-poll, dated respectively July 7, 1887, and March 18, 1889, duly executed and attested by two witnesses, in accordance with the provisions of the Wills Act, as together constituting the last will of the deceased. The facts of the case are sufficiently stated in the judgment.

Middleton, for the plaintiff, referred to Williams on Executors, 8th ed. pt. 1, bk. i. ch. 2, s. 3, and *Airey* v. *Bower*. (1)

B. Deane, for the defendant, one of the next of kin.

Cur. adv. vult.

THE PRESIDENT. In this action the plaintiff propounds the will and the codicils, dated respectively April 3, 1884, July 7, 1887, and March 18, 1889, of the deceased, Melicent Caroline Volbracht. The defendant denies that the two last-dated documents were executed in accordance with the Wills Act. The material facts appear to be as follows: The deceased, being then unmarried, a British subject, and having an English domicil, in

(1) 12 App. Cas. 263.

1890

MILNES v. FODEN

The President

1847 executed a declaration of trust of certain property, whereby the property was to be held in trust as the deceased should by deed appoint, and subject thereto, and after her decease for such persons as she should by will appoint. In 1849 the deceased married a Mons. Volbracht, a Belgian subject, and a domiciled Belgian. By a settlement executed in contemplation of this marriage, the deceased settled the property comprised in the trust deeds of 1847 upon such trusts as she should by revocable deed or by will appoint. In 1865 the deceased obtained a divorce from her husband in Belgium. She continued, however, to retain the Belgian domicil, which she had acquired on her marriage, until October, 1887. In 1880 she executed a will in the English form, purporting to dispose of all her property, expressly including the property over which she had a power of appointment, and appointing executors. In 1884 the deceased executed a holograph will in accordance with the Belgian law, but not in accordance with the Wills Act. By this will she disposed of all her property, though not expressly referring to the property over which she had a power of appointment, and appointed executors. This is the document, dated April 8, 1884, propounded by the plaintiff. On June 7, 1887, the deceased executed a revocable deed-poll, attested by two witnesses as required by the Wills Act, whereby she appointed the settled property upon certain trusts as therein mentioned from and after her decease. This, also, is one of the documents propounded by the plaintiff. In October, 1887, she abandoned her Belgian domicil and resumed her English domicil. In 1889 the deceased executed another revocable deed-poll, also attested by two witnesses as required by the Wills Act, whereby she somewhat varied the appointments contained in the deed-poll of June 7, 1887. The trusts, as varied, are still to take effect upon her death. This is the last of the documents propounded by the plaintiff. The deceased died on May 23, 1889, leaving Mons. Volbracht her surviving. The defendant, the sole next of kin, does not oppose the admission to probate of the Belgian will of 1844, and it appears clear that this is entitled to probate. The deceased was by birth a British subject, and except by statute could not lose her British nationality. The Naturalization Act of 1870, which enacts that married women shall have

the nationality of their husbands, could have no application to the deceased, as she had ceased to be a married woman prior to the passing of the Act. The deceased, therefore, being a British subject, executed the will of 1844, both in accordance with the law of her then Belgian domicil, and in accordance with the law of the place where executed—viz., Belgium. On both or either of these grounds the will of 1844 is entitled to probate under Lord Kingsdown's Act. The remaining question is whether the deeds-poll are entitled to probate. The true principle to be deduced from the authorities, as stated in Williams on Executors, pt. i. bk. ii. ch. 2, s. 3, appears to be that if there is proof, either in the paper itself or from clear evidence dehors, first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it, then whatever may be its form it may be admitted to probate as testamentary. It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act. In my opinion both the deeds-poll fulfil the essential conditions just mentioned, and are, together with the will of 1884, entitled to probate.

Solicitor for plaintiff: *J. R. Hall.*
Solicitors for defendant: *Burgoyne, Milnes, & Burgoyne.*

W. L.

IN THE GOODS OF COPE.

March 11.

Administration—Grant to Official Receiver in Bankruptcy—Sureties to Bond dispensed with.

Where a grant of administration to the estate of a deceased intestate was made to the chief official receiver in bankruptcy, the Court, while requiring him to give the administration bond, dispensed with the usual sureties.

APPLICATION on behalf of the chief official receiver in bankruptcy for a grant of administration to the estate of a deceased intestate, and to dispense with sureties to the administration bond.

On December 5, 1888, a receiving order in bankruptcy was made against William Penfold Cope, the father and next of kin

1890

IN THE GOODS OF COPE.

of the deceased, and he was adjudicated bankrupt, Robert Palmer Harding, the chief official receiver, being appointed trustee of the estate. William Hobson Cope, the intestate, died February 17, 1889, an infant, unmarried and intestate, his sole property consisting of a policy of assurance for 100*l.* on his own life effected in 1887. The bankrupt—the father—did not apply for administration to his son's estate, and on December 16, 1889, the chief official receiver applied for a grant; but the motion was directed to stand over in order that the next of kin—the father—might be cited.

On February 5, 1890, he was personally served with a citation, but no appearance had been entered.

Muir Mackenzie, for the official receiver, now renewed the application, and asked that under the circumstances the usual sureties to the bond might be dispensed with. [He cited *The Solicitor to the Duchy of Cornwall* v. *Canning* (1) and *Cleverly* v. *Gladdish.* (2)]

THE PRESIDENT made the grant, and in view of the position of the applicant, as an officer of the High Court and on the authority of *The Solicitor to the Duchy of Cornwall* v. *Canning* (1), directed that the sureties to the administration bond should be dispensed with.

Solicitor: *The Solicitor to the Board of Trade.*

(1) 5 P. D. 114. (2) 2 S. & T. 335.

W. L.

FERGUSON-DAVIE *v.* FERGUSON-DAVIE.

1890
April 16.

Probate—Will or Codicil—Intention expressed on the face of Document—Testamentary Paper executed "not as Legal Will, but as a Guide."

A testatrix having duly executed a will, subsequently executed a paper drawn up by her husband with her full concurrence, which was headed "This is not meant as a legal will, but as guide":—

Held, that the paper was not a valid testamentary document, and that probate must be refused.

APPLICATION for probate.

Charles Robert Ferguson-Davie, as sole executor of his wife, propounded, as a codicil to her will made February 8, 1888, the following document drawn up by him with her assent, duly executed by her on September 2, 1889:—

"*This is not meant as a legal Will, but as Guide.*

"I Anne Ferguson-Davie having power to distribute to my children according to my father's, Biggs Andrews, Esq.'s will, the property or monies left in hands of trustees, viz., Rev. Chas. Robt. Ferguson-Davie, Joseph Kaye, Esq., and Francis Elliot Kitchener, Esq., do hereby appoint that a sum not exceeding £6000 be paid out of the estate to my eldest son Francis Andrews Ferguson-Davie, Lieut. in Black Watch, within 3 months of my decease, and that the money be invested as the trustees hereafter named may think desirable.

"Further, that the residue, with the exception of what is left to my husband in my Will, be divided among my 3 other children, viz., Hy. Herrick Ferguson-Davie, Anne Helen Ferguson-Davie, and Chas. Jas. Ferguson-Davie, as they come of age.

"Further, in case of any of my children dying unmarried, their share is to be divided amongst the survivors. [Further, I appoint Rev. Chas. Ferguson-Davie, Joseph Kaye, Esq., and Francis Elliot Kitchener, as trustees.]

"Witness my hand

"this second day of September, 1889.

"Anne Clarissa Ferguson-Davie.

"Signed in presence of

"Reginald C. Bacon,

"Clerk in Holy Orders.

"Jennie E. H. Davie,

"Nurse, N. N. H."

1890

FERGUSON-DAVIE v. FERGUSON-DAVIE.

There were four children of the marriage surviving, of whom three were minors, and they had elected their father as guardian ad litem, to intervene in the suit and support the codicil.

The defendant, Francis Andrews Ferguson-Davie, was the eldest son of the plaintiff and of the testatrix, and his interest was adversely affected by the codicil. He pleaded in opposition that it was not a testamentary document.

Both the will and codicil purported to be made under and by virtue of certain powers of appointment therein recited.

Bayford, Q.C. (*Searle,* with him), for the plaintiff and interveners.

C. A. Middleton, for the defendant. There is no case upon record in which it has been held that a paper is testamentary which, on the face of it, has been stated not to be meant as testamentary.

[He referred to Williams on Executors, 8th ed. p. 107, n. (q).]

BUTT, J. To use the language of the note in Williams on Executors, just referred to by Mr. Middleton, this document is certainly not "silent," but it can hardly be said not to be "equivocal." The first essential of a testamentary document would seem to be that it is meant to have the effect of a testamentary document. By the document in question the testatrix practically said: "I do not dispose of the property; I merely leave this paper as a guide to my executor and trustees to deal with a certain portion of my property in the manner indicated, if they can do so." Supposing I were to admit this paper to proof as a codicil, what power is there for the trustees or anybody else to keep back the lump sum of 6000*l.* from the defendant? The plaintiff has sworn that the testatrix was uneasy about the extravagance of her eldest son, the defendant, so that to give him a lump sum of 6000*l.* would seem to be the least likely thing she would have wished. The matter has been very properly brought before the Court for determination. I am not aware of any case in which a document bearing upon the face of it a positive assertion by the person who has executed it that it is not meant to operate as a legal will has been held to be a valid testamentary document, and I do not think the docu-

ment before me ought to be so held. Taking that view, as I do, I am glad to think that, if I were to give effect to this paper, I should be frustrating the real wishes of this lady. I therefore reject the codicil propounded, on the ground that it is not a testamentary paper. I allow the costs of both parties out of the estate.

Solicitors for plaintiff: *Aldridge, Thorn, & Morris, for Fenn, d'Albani, & Ellis, Newmarket.*

Solicitors for defendant: *Bower, Cotton, & Bower.*

W. L.

IN THE GOODS OF G. B. RUSSELL.

April 22.

Will—Execution of Power of Appointment—Subsequent Marriage—Revocation—Wills Act (1 *Vict. c.* 26), *s.* 18—*Limited Probate.*

A testator by his will bequeathed all the real and personal estate to which he might be entitled at the time of his death, or over which he had power of appointment, to A. B., and appointed her his sole executrix. He subsequently married A. B., and died without making another will.

The property over which he had power of appointment under the will of his mother if he had not exercised it would have been divided among his brother and sisters:—

Held, that so much of the will as was in execution of the power of appointment came within the exception of s. 18 of the Wills Act (1 Vict. c. 26) and was not revoked by marriage, and that administration with the will annexed might be granted to the widow, limited to the property over which the testator had a power of appointment.

APPLICATION for probate.

George Brown Russell, late of Hampton-Wick, in the county of Middlesex, died on October 29, 1889, having by his will, dated March 17, 1885, appointed Julia Harnett Smith, spinster, his sole executrix and universal legatee. The material words of the will were: "I give, devise, and bequeath all my real and personal estate to which I shall be entitled at the time of my decease, or over which I shall at the time of my decease have a power of appointment to Julia Harnett Smith, and I appoint her my sole executrix." Subsequently, on November 14, 1888, Mr. Russell was lawfully married to the said Julia Harnett Smith.

By virtue of the will of his mother, Eliza Russell, the deceased

1890

IN THE GOODS OF RUSSELL.

had a power of appointment over certain trust funds by will or any testamentary paper of appointment, and in default of such appointment the said trust funds were bequeathed in trust for such of the children of the said Eliza Russell as should be living at the death of the said G. B. Russell, and if more than one of them, in equal shares. At the date of the death of G. B. Russell there were four children of the said Eliza Russell surviving, one son and three daughters, who had been served with notice of this motion. The deceased never made any other will but that of March 17, 1885.

Inderwick, Q.C. (*Melsheimer*, with him), moved to admit the will to probate. The will is within the exception of the 18th section of the Wills Act. (1) The persons here entitled under the Statute of Distributions are the wife and the brother and sisters, but if the will is held to be revoked the property would go to the brother and sisters under the mother's appointment.

[He cited *In the Goods of Sir C. Fitzroy.* (2)]

C. A. Middleton, contrà. The widow undoubtedly would be excluded under the settlement—and to that extent the will may come under the exception—but that exception applies only to wills which are testamentary appointments in execution of a power. This will is too large, and disposes of the testator's property generally. In all the cases bearing on this question the will has been nothing more than the exercise of a power of appointment.

[BUTT, J. Supposing I should be of opinion that a will which disposes of other property in addition to exercising a power of appointment is not within the exception—is not *In the Goods of Fitzroy* (2) an authority for holding that that portion of the will which deals with other property is revoked by the marriage, but that all that which refers to the power of appointment remains?]

(1) 7 Wm. 4, and 1 Vict. c. 26, s. 18: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions."

(2) 1 S. & T. 133.

The case of *In the Goods of Fitzroy* (1) was not opposed, and the question therefore was never argued. It is difficult to see how, if probate were granted, it would be made clear that it did not operate on the whole property.

[He referred to *In the Goods of Fenwick* (2), and *In the Goods of M'Vicar.* (3)]

Inderwick, Q.C., in reply, offered to consent that the probate should be limited to such property as the testator had power to appoint.

BUTT, J. This is the case of the will of a gentleman, who, under some family arrangement or settlement, had a power of appointment over certain property by will. He made a will disposing of his property generally; and there is also in the will a clause exercising the power of appointment. After he had made that will he married; he never made any other will, and he is now dead. The question is, whether his marriage has revoked his will altogether, or has revoked only the general disposition of his property, leaving that part of the will which exercises the power of appointment standing. Of course one would wish to see whether it is not possible to give effect to so much of the dispositions of the will in question as ought not to be revoked by the subsequent marriage, and if one can so deal with the matter as to preserve that part of the will one ought to do so.

The matter rests really on the 18th section of 1 Vict. c. 26, which Mr. Inderwick has read. Two questions arise. First it is said that a will disposing of a man's property generally, and also exercising a power of appointment under some other settlement or power, is not a will made in the exercise of a power of appointment; the power, it is said, must be exercised alone. That is the main question which I have to decide. The second question is, assuming it to be a will within the earlier words of s. 18, is it within the proviso of the section. It appeared to me early in the case that if it is a will which might otherwise be affected by this section, it is saved by being within the proviso. The words of the proviso shew tolerably clearly that that is so, and

(1) 1 S. & T. 133. (2) Law Rep. 1 P. & D. 319.
(3) Law Rep. 1 P. & D. 671.

1890

IN THE GOODS OF RUSSELL.

Butt J.

that view was very properly accepted by Mr. Middleton. Therefore the question remains under the other part of the section, is it revoked in toto, although it contains a power of appointment, by reason of the testator's marriage. The case of *In the Goods of Fitzroy* has been cited, in which Sir Cresswell Cresswell held that a will exercising a power of appointment, as this will does, and also disposing of a testator's property other than that included in the power of appointment, was not entirely revoked by marriage, but that that part of it which exercises a power of appointment was within the proviso and must be held good, and he gave administration with the will annexed. So far, that is a direct authority in favour of Mr. Inderwick's contention. But it is said by Mr. Middleton that that was an ex parte application, and that Sir Cresswell Cresswell had not the advantage of hearing any arguments on the other side. If I were disposed to think that the case had been wrongly decided, I might say that I was not bound by that decision; but I do not think anything of the sort. I think the case was rightly disposed of, and, that being so, I think I ought not to go from it. Therefore, the order I shall make on this application is, that there be an administration to the wife with the will annexed, limited to the property over which the testator had power of appointment, the costs to be paid out of the appointed fund.

Solicitors for applicant: *Andrew, Wood & Co.*
Solicitors for next of kin: *Few & Co.*

W. L.

DE LOSSY *v.* DE LOSSY.

1890
April 1.

Divorce—Permanent Maintenance—Default in Payment—Enforcement of final Order by Attachment.

A decree having been made absolute for a divorce on the wife's petition, the husband, as part of the final order, was directed to pay a permanent maintenance to his wife at the rate of 200*l.* a year :—

Held, that the Court had no power to grant an attachment against the husband for non-payment of arrears of the annuity due under the order.

THIS was a suit for dissolution at the instance of the wife, and a decree absolute had been pronounced on February 29, 1883. By consent, an order was made at the hearing that the respondent do pay to the petitioner by way of permanent maintenance the sum of 200*l.* annually during their joint lives, the sum to be paid quarterly in advance. Towards the end of 1888 the respondent stopped the payments, and directed his solicitor to write to the petitioner that he had done so in consequence, as he was informed and believed, of her not leading a chaste life.

Inderwick, Q.C., moved to attach the respondent for non-payment of the instalments due since January, 1889, the arrears amounting in all to 250*l.*

[BUTT, J. Has an attachment ever been issued by this Court to enforce an order for a money payment made under a final decree, and has it ever been held, in regard to a final judgment of the Court directing money payments, that non-compliance was contempt of Court?]

Perhaps the correct course would be to take out a summons in chambers, and if the respondent did not obey the order then made he could be committed.

BUTT, J. I do not think the Court has any power to make such an order as now asked for, and I must dismiss the motion, therefore, with costs.

Motion dismissed.

Solicitors for petitioner: *Merrick & Co.*

Solicitors for respondent: *Harting, Son, & Ellis.*

W. L.

1890

April 15.

COOK *v.* COOK.

Divorce—Sequestration—Registration—Lands Charges Registration and Searches Act, 1888 (51 & 52 *Vict. c.* 51)—*Summons to Vacate Registration—Jurisdiction.*

A husband being in default for non-payment of alimony and costs, writs of sequestration were issued to enforce payment, and were duly registered under the Lands Charges Act, 1888. Before the sequestrators could sell the property in respect of which the writs had been issued, the husband assigned his interest therein, and the assignee having satisfied the claims, by paying an agreed sum into Court, the petitioner, with the concurrence of all parties, applied to discharge the sequestrators and to vacate the registration of the writs:—

Held, that there was no power under the Act to order the registration of the writs to be vacated.

THIS was an application, which had been adjourned into Court from chambers, to order the discharge of sequestrators and the vacation of two writs of sequestration, which had been duly registered under the Lands Charges Registration and Searches Act, 1888, under the following circumstances:—

On February 1, 1889, Elizabeth Cook obtained in this Division an order for alimony pendente lite at the rate of 5*l.* per month.

The respondent, Robert Charles Cook, failed to obey the order, and on February 26, 1889, a writ of sequestration was issued to enforce payment.

On March 5, 1889, a second writ of sequestration was issued in respect of an amount of 26*l.* 7*s.* due to the petitioner's solicitor, which amount the respondent had, by an order of February 14, 1889, been directed to pay.

On May 10, 1889, an order was made in the Chancery Division, that unless the sums due by the respondent were paid by a certain date, his interest in certain freehold and leasehold premises should be sold.

The respondent disregarded this order also; but, before the premises could be actually sold, he assigned all his interest therein to William Hall Warren, his solicitor, and the latter applied to the Chancery Division to discharge the orders affecting the assigned properties, upon payment into Court of the sums due.

On December 19, 1889, Kay, J., ordered that upon payment into Court of a sum of 250*l.* the petitioner should do, and concur in doing, all necessary acts for the discharge of the sequestrators.

The said sum was duly paid into Court; but upon application being made to the officials in the Land Registry, they declined to vacate the registration of the writs, on the ground that the Act of 1888, which gives power to register the writs, confers no jurisdiction or authority to vacate the same.

The petitioner appealed to the judge in chambers, and the summons was, by his direction, adjourned into Court.

Cluer, for the respondent, moved the Court, in the absence of counsel for the petitioner. Both parties are anxious that the writs should be vacated. The Act of 1888 (51 & 52 Vict. c. 51), s. 14, gave the Court the necessary power; but, if not, there is inherent jurisdiction and power in the Court to make the desired order. [He also referred to 23 & 24 Vict. c. 115, s. 2.]

[BUTT, J. You argue that because there was power to enter satisfaction under the earlier Act, there must be power to vacate under the later Act. But Bowen, L.J., and other judges in chambers, have said that they had no power under the Act of 1888 to vacate duly registered writs.]

The matter has never been decided in Court.

BUTT, J. I would help you if I could, but I really have no power under the Act to do what you wish. I make an order for the discharge of the writs of sequestration and sequestrators. More I cannot do. The respondent must pay the petitioner's costs of this application and of the summons in chambers.

Solicitor for the petitioner: *H. H. Hood Barrs.*
Solicitor for the respondent: *W. H. Warren.*

W. L.

1890
April 29.

SWIFT *v.* SWIFT.

Restitution of Conjugal Rights—Disobedience of Decree by Wife—Order for Settlement on Husband out of Wife's Income under the Marriage Settlement —Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 3.

Where a wife had refused to obey a decree of restitution of conjugal rights, and was in the enjoyment of a separate income, part of which was payable under the trusts of the marriage settlement, the Court ordered her to settle a permanent maintenance on her husband.

APPLICATION by a husband, the petitioner in a suit for restitution of conjugal rights, for an order on his wife, who had refused to obey a decree made in the cause, to pay him permanent maintenance under the 3rd section of the Matrimonial Causes Act, 1884, out of her separate income under her marriage settlement.

A decree for restitution of conjugal rights was made on July 3, 1889, and was served on the wife on October 24, 1889, but she did not obey it. The petitioner then presented his petition for permanent maintenance, and the registrar to whom it was referred reported that the husband's income was 45*l.*, and the wife's income 820*l.* 16*s.* 8*d.*, viz., 227*l.* 16*s.* 8*d.* from property comprised in the marriage settlement, 73*l.* from other property acquired since the marriage and invested in securities subject to the same trusts as the marriage settlement, and 520*l.* from property bequeathed to her by her father. The property in settlement was settled on trust to pay the income to the respondent for her sole and separate use, and the property bequeathed by the father's will was declared to be in trust for the sole and separate use of the wife, without power of anticipation, and it was further provided by the will that if she should do anything whereby voluntarily or involuntarily her interest would be alienated or incumbered, such interest should cease, and the trustee should deal with the fund as if she were dead.

The registrar submitted that the Court had no power in such a case as this to vary the settlements made on the marriage, or to order any payment to be made out of the income enjoyed by the wife under the will of her father.

B. Deane, for the petitioner. It is submitted that the registrar was wrong, and that the Court has power under s. 3 of the Matrimonial Causes Act of 1884 (1) to order the respondent to make an annual payment out of the income derived from the funds under the marriage settlement.

C. Matthews, for the respondent. The Court has no power to vary the marriage settlement, which would be the effect of making such an order, except in cases of dissolution of marriage.

BUTT, J. I agree that I cannot alter the marriage settlement; and if I were asked to do it I should refuse. But if I find the lady in possession of an income, I need not ask where she derives it from. I can order that out of it she pay a certain sum annually to her husband. I have no hesitation in making such an order in this case. The matter will be referred back to the registrar to fix the quantum.

Solicitors for petitioner: *Peacock & Goddard.*
Solicitor for respondent: *Harston.*

(1) The material words of the section are: "Where the application for restitution of conjugal rights is by the husband, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, or in receipt of any profits of trade or earnings, the Court may, if it shall think fit, order a settlement to be made to the satisfaction of the Court of such property, or any part thereof, for the benefit of petitioner and the children of the marriage or either or any of them."

W. L.

1890
March 11.

IN THE GOODS OF ANNE ASHLEY.

Administration—No known Relatives of Deceased—Grant ad colligendum to a Creditor.

A woman having died intestate without any known relatives, and it being impossible to ascertain whether she had ever been married, or, if married, whether her husband survived her, the Court made a grant ad colligendum to an unsecured creditor, and accepted the affidavit of his solicitor that "he was informed and verily believed that she died a widow without any known relations, and intestate."

MOTION by a creditor for a grant of administration ad colligendum.

Anne Ashley, late of 23, Upper Woburn Place, in the county of Middlesex, died on February 25, 1890. Search was made amongst her papers, but no will was found, and she was believed to have died intestate, without any known relatives, but nothing certain could be ascertained as to this, nor even whether she had ever been married, nor, if so, whether she died a widow. Affidavits were filed by the applicant, William Ernest Milner, secretary to Hewetson, Milner, & Thexton, Limited, creditors of deceased to the amount of 68*l.*, and by Mr. Bell, his solicitor, stating that, as they were informed and verily believed, the deceased died a widow and intestate.

The deceased carried on the business of a lodging-house keeper at 23, Upper Woburn Place aforesaid, and an amount of about fifteen guineas was due to her from lodgers. The other assets consisted of a sum of about 5*l.* in money found in the house, and the furniture and household effects, about 275*l.* in value. The liabilities were: rent due at Christmas, 1889, 27*l.* 10*s.*, parochial rates due, 12*l.* 10*s.* 2*d.*; bill of sale held by the Consolidated Company, Limited, of 43, Great Tower Street, 73*l.* 6*s.*; funeral expenses, 14*l.* 5*s.* 6*d.*; due to the applicants' firm, 68*l.* 1*s.*, and wages to servants and sundry other items, bringing the total liabilities up to 276*l.* 14*s.* 9*d.*

It was feared that the landlord would distrain, as another quarter's rent would be due at Lady Day, 1890.

The parish authorities had already obtained a magistrate's

order for the amount due for rates, and had given notice that they would levy execution if the same were not paid by March 25, 1890.

An instalment of 9*l.* was due to the bill of sale holders on March 9, 1890, and it was feared that they, too, might step in and seize the furniture.

C. A. Middleton, in support of the motion. The applicant's firm are the first creditors in point of date, and their claim is next largest in amount after the bill of sale. No information can be obtained from the neighbours of the deceased, nor from others, as to her family history.

THE PRESIDENT. I think that, as I have the affidavit of a responsible person, who is an officer of the Court, that he cannot find anybody connected with the deceased's family, the grant may go, and I, therefore, make an order for a grant ad colligendum, with liberty to the applicant to pay the debts due to the landlord, the bill of sale holder, and the parish, and to pay and discharge the servants.

Solicitor: *Herbert B. Bell.*

W. L.

[DIVISIONAL COURT.]

March 10; *April* 28.

THE CASHMERE.

Practice—Appeal from County Court to Divisional Court—Interlocutory Order—Costs of Witnesses—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict.* c. 71), s. 26—*County Courts Act,* 1888 (51 & 52 *Vict.* c. 43), s. 120—*County Court Rules,* 1889, *Order* L., *r.* 16.

By s. 26 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), an appeal may be made to the High Court of Admiralty by permission of a judge of a county court from any interlocutory order therein.

By s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), the party aggrieved by the judgment, direction, decision or order of a county court judge may appeal from the same to the High Court.

By Order L., r. 16, of the County Court Rules, 1889, the costs of witnesses, whether they have been examined or not, may, unless otherwise ordered by the judge, be allowed.

On an appeal, without leave, from an interlocutory order made by a county

1890

THE CASHMERE.

court judge, disallowing the costs of witnesses not called, on the ground that no application for their expenses had been made to him at the trial:—

Held, that the Admiralty Division had no jurisdiction to entertain the appeal, for such an order was not within s. 120 of the County Courts Act, 1888, and therefore s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, still applied:

Held, also, that Order L., r. 16, of the County Court Rules, 1889, being a general rule relating to county courts, could not be modified by the practice established by the judge of a particular county court.

APPEAL by the plaintiffs, the Great Northern Steamship Fishing Company, Limited, against the decision of the judge of the county court of Glamorganshire, holden at Cardiff, upholding the decision of his registrar disallowing certain items in the plaintiffs' costs.

The action was for damage by collision, and, after the first witness had been cross-examined, the defendants agreed to the suggestion of the plaintiffs, that they should not call more than two witnesses on each side.

The plaintiffs accordingly only called the pilot and an independent witness, there being in attendance also, to be called if necessary, the master, a mate, an engineer, and the look-out on board the plaintiffs' vessel.

Judgment was given for the plaintiffs with costs; but the registrar, on taxation, disallowed the charges for proofs and the expenses of all the witnesses who were not actually examined, certifying the practice to be as follows: "The practice in this Court is by direction of his honour to allow the costs of witnesses called; if it be desired to have witnesses allowed who have not been called, application should be made to the judge for their allowance."

The plaintiffs filed objections to the taxation, and appealed to the judge against the disallowance of the witnesses by the registrar. The judge dismissed the appeal with costs on the ground (1) that no application was made to him at the trial for the allowance of the costs and expenses of the witnesses, and (2) that it was agreed at the time of hearing that only two witnesses should be called on each side.

Sir Walter Phillimore, and *Nelson*, for the plaintiffs.

Pyke, for the defendants, took the preliminary objection that this was an appeal from an interlocutory order, and could not, under s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, be brought without the permission of the county court judge.

The arguments of counsel sufficiently appear from the judgment. On the question of the preliminary objection the following cases were referred to: *Carr* v. *Stringer* (1); *Jonas* v. *Long* (2); *Jacobs* v. *Dawkes* (3); *Dingor* v. *Matthews* (4); *Conservators of the River Thames* v. *Hall* (5); *Mitchell* v. *Simpson* (6); *Garnett* v. *Bradley*. (7)

THE PRESIDENT. Whatever decision we may come to on the preliminary question, it is desirable that we should express our opinion on the merits of the case, as the learned judge will in the future be influenced thereby.

It appears that a practice has prevailed in this county court which is the direct opposite of the rule which has been framed by the proper authority. (8) It is obvious that the learned judge has no right to establish a local practice of that kind, and that it cannot prevail as against the general rule. It is plain that the registrar based his judgment solely upon the local practice, and, in our opinion, that was an insufficient reason. Then, when the matter came before the judge, he dismissed the plaintiffs' appeal with costs on the ground that no application was made to him at the trial for these witnesses' expenses. That is a reassertion of his own local practice, as against the general rule by which he ought to have been governed.

The other ground put forward by the learned judge is, that it was agreed at the hearing that only two witnesses should be called on each side; but that has nothing to do with the question as to what costs of what witnesses should be allowed. The parties in effect said they would not trouble the court with a great

(1) E. B. & E. 123.
(2) 20 Q. B. D. 564.
(3) 56 L. J. (Q.B.D.) 446.
(4) 88 L. T. Journ. 139.
(5) Law Rep. 3 C. P. 415.
(6) 23 Q. B. D. 373.
(7) 3 App. Cas. 944.
(8) The County Court Rules, 1889, Order L., r. 16: "The costs of witnesses, whether they have been examined or not, may, unless otherwise ordered by the judge, be allowed. . ."

1890

THE CASHMERE.

number of witnesses, but would be content with two on each side. That does not prove that the plaintiffs were not quite right in bringing down other witnesses than those two whom they called. The last ground is, therefore, no reason at all, and we must allow the appeal, unless the preliminary objection prevails.

BUTT, J. I am of the same opinion. If witnesses are summoned in a county court and their expenses are not to be allowed because they have not been called, a great waste of time might result, because a solicitor who has a number of witnesses present, even if his case is substantially proved, will go on calling them, feeling that if he does not he will not get their costs.

1890. April 28. BUTT, J. [delivered the judgment of the Court on the point of law reserved and, after referring to the previous opinion given in favour of the appellants on the merits, continued:—] The objection taken by the respondents is that, unless the leave of the county court judge has been obtained, this Court has no jurisdiction to hear an appeal from an interlocutory order on a mere question of costs. In support of the objection the respondents rely upon s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, which is as follows: "An appeal may be made to the High Court of Admiralty of England from a final decree or order of the county court in an Admiralty cause, and, by permission of the judge of the county court, from any interlocutory decree or order therein, on security for costs being first given and subject to such other provisions as the general orders shall direct." As far as that section of that Act of Parliament is concerned, it would seem clear that there is no appeal from a decision of a judge, upon such a matter as this, without his leave; but then it was contended by the appellants that this was altered by s. 120 of the County Courts Act, 1888, the material part of which is as follows: "If any party in any action or matter shall be dissatisfied with the determination or decision of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner, and

subject to such conditions, as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court." I should have been inclined to think that even if these words of the General County Courts Act of 1888 gave a right of appeal in interlocutory orders, without leave of the judge, still they would not repeal or alter the provisions of the County Courts Admiralty Jurisdiction Act, 1868; but it seems to me that the words of the Act of 1888 apply to proceedings at the trial, and to an appeal from a final judgment, and have no reference to interlocutory orders of a county court. In this opinion I am confirmed by the case of *Carr* v. *Stringer* (1), where the Court of Queen's Bench held that the words of s. 14 of 13 & 14 Vict. c. 61, which are very similar to the words in the Act of 1888, gave no jurisdiction to entertain an appeal from the decision of a county court on an interlocutory matter such as the taxation of costs. I am authorized to say that the President agrees with this view, and therefore our judgment will be that the appeal be dismissed; but as the appellants have really succeeded on the merits, we think it should be dismissed without costs.

Appeal dismissed.

Nelson applied for leave to appeal to the Court of Appeal.

BUTT, J. As we have decided that we have no jurisdiction to entertain the appeal from the inferior Court, we have no power to give leave to appeal to the Court of Appeal.

Solicitors for appellants: *Lowless & Co.*
Solicitors for respondents: *Ingledew, Ince, & Vachell.*

E. S. R.

(1) E. B. & E. 123.

1890
Feb. 26.

[IN THE COURT OF APPEAL.]

BUTLER *v.* BUTLER.

Divorce—Costs—Appeal—Intervention of Queen's Proctor—Wife's Costs—Divorce Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 51—*Matrimonial Causes Act,* 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2—*Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 49.

Although in proceedings for divorce a wife as a general rule is allowed her costs, the allowance of such costs is under the Divorce Act, 1857, s. 51, in the discretion of the Court, and there is no appeal from the refusal of the Court to order the wife's costs to be paid.

The costs occasioned to a wife by the intervention of the Queen's Proctor are also within the discretion of the Court, and if the judge in his discretion disallows them, an appeal from an order refusing them will not lie.

APPEAL from an order of Butt, J., upon an application with reference to the wife's costs in a petition for dissolution of marriage. The wife petitioned for dissolution of marriage, and by order of the registrar the husband paid into Court 50*l.* as security for her costs. The husband presented a cross-petition for dissolution, and paid into Court 40*l.* as security for the wife's costs. On the 23rd and 25th of June, 1888, the two suits were tried together. The husband's petition was dismissed with costs as against the co-respondent, but no provision was made as to the costs of the wife; and on the other petition, Butt, J., made a decree nisi for dissolution, giving the wife her costs of both suits.

In July, 1888, the wife applied for payment out of Court of the 50*l.* and 40*l.*, but the application was refused as premature. (1)

In December, 1888, the Queen's Proctor intervened, alleging that the wife had been guilty of adultery, and that she had obtained her decree by collusion and suppression of material facts. On April 4, 1889, the registrar made an order on the husband to pay the wife's costs of the intervention up to that time, and to pay 50*l.* into Court to secure her further costs.

In August, 1889, the trial upon the Queen's Proctor's intervention took place. The jury did not agree as to whether the wife had been guilty of adultery, but found that she had obtained

(1) 14 P. D. 160.

the decree nisi by collusion and suppression of material facts. Butt, J., thereupon rescinded the decree nisi, reserving the question of costs, and in January, 1890, this decision was affirmed by the Court of Appeal. After the first trial the wife had changed her solicitors.

In February, 1890, the wife moved that her costs of the trial in August, 1889, and all other costs incurred by her since the order for costs of June 25, 1888, might be taxed and might be paid by the husband; that her costs of the trial in June, 1888, which had been taxed under the order nisi of June 25, 1888, might be paid by the husband, and that the 90*l.* and 50*l.* might be paid to her solicitors. Butt, J., refused to make any order. (1) The wife appealed.

Stevenson, for the wife. The costs were not costs in the discretion of the Court, and an appeal lies in respect of them. It was the settled practice before the Judicature Acts that a wife should have her costs of divorce proceedings, except where her solicitors had been guilty of misconduct, and this practice has been continued. The Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 51. The Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 2; *Robertson* v. *Robertson* (2); *Flower* v. *Flower* (3); *Whitmore* v. *Whitmore* (4); *Gladstone* v. *Gladstone* (5); *Turner* v. *Hancock*. (6)

Middleton, for the husband, was not called upon.

COTTON, L.J. This is an appeal from a decision of Butt, J., refusing to make an order in the appellant's favour as to costs. The costs divide themselves into two branches, and in each case there is a preliminary objection that there is no appeal where costs are in the discretion of the Court. The Divorce Act of 1857, s. 51, enacts that the Court may make such order as to costs as to the Court shall seem just, and that there shall be no appeal on the subject of costs only. It is said here that the wife has orders which she is entitled to enforce. But an order that the husband shall pay a sum of money into Court as a security for such costs of the wife as the Court shall adjudge him to pay

(1) Ante, p. 32.
(2) 6 P. D. 119.
(3) Law Rep. 3 P. & D. 132.
(4) Law Rep. 1 P. & D. 96.
(5) Law Rep. 3 P. & D. 260.
(6) 20 Ch. D. 303.

1890
BUTLER
v.
BUTLER.
Cotton, L.J.

is a very different thing from an order that he shall pay her costs, and she cannot rely on the orders for payment into Court. She obtained on her petition a decree nisi for dissolution of the marriage with costs, her costs were occasioned partly by her own petition—partly by that of her husband, which was dismissed. But nothing was said as to her costs in the order dismissing the husband's petition, the direction that he should pay her costs was contained in the decree nisi. Afterwards the Queen's Proctor intervened on the grounds that the wife had been guilty of adultery, and that the decree had been obtained by collusion. The jury did not find adultery, but it found collusion, and Butt, J., rescinded the decree nisi. That decision came before us on appeal, and we affirmed it. When the decree nisi was rescinded, the order for costs contained in it dropped, and when the judge reserved the question of costs, that must not be taken as done in order to keep the decree nisi alive as to costs, but for the purpose of leaving the question of costs to be dealt with by him as he should think right. There is therefore no subsisting order as to costs on which the appellant can rely.

Now, are the costs up to and including the trial of June, 1888, costs within the discretion of the judge? for if so, we are precluded by s. 49 of the Judicature Act, 1873, from hearing an appeal in respect of them. We were referred to *Whitmore* v. *Whitmore* (1) as to what is to be done as to costs where the decree nisi is discharged; but in that case the decree nisi was not discharged so far as related to costs, so there was a subsisting order giving the wife her costs. In *Gladstone* v. *Gladstone* (2) the Queen's Proctor had intervened after the decree nisi; but the issue raised by him had not been tried, so the decree nisi was standing, and the wife was held entitled to enforce the order as to costs contained in it. The wife, as a general rule, is entitled to costs, but that does not dispose of the question whether the costs are not within the discretion of the Court. It was held in *Jones* v. *Jones* (3) that, though the settled practice of the ecclesiastical Courts had been to give the wife her costs, the Divorce Act of 1857 gave the Court a discretion as to them, and

(1) Law Rep. 1 P. & D. 96. (2) Law Rep. 3 P. & D. 260.
(3) Law Rep. 2 P. & D. 333.

that throws light upon what has been said in other cases as to the right of the wife to costs. She gets them in ordinary circumstances, but subject to the discretion of the judge. I am of opinion that in the present case these costs were within the discretion of the judge, and that we are precluded by the Judicature Act from considering whether his discretion was rightly exercised.

As to the costs occasioned by the intervention of the Queen's Proctor, they must be within the discretion of the judge, for there is no ground on which they can be held to differ from other costs in this respect. It was urged that the wife's present solicitor has a locus standi, and that to refuse costs is a hardship upon him. But though the Court is in the habit of allowing costs to the wife that she may be able to employ a solicitor to defend her, the solicitor has no independent right. I think that these also were costs within the discretion of the judge, and that an appeal from that discretion will not lie. It was urged that he did not exercise any discretion, but went on what he understood to be a rule of practice; but I think that he did exercise his discretion. He appears to me to have considered that the wife's conduct disentitled her to costs, and not to have so founded his judgment on any supposed rule as to make it appealable, or to make it reasonable for us to give the wife an opportunity of applying to him for leave to appeal.

LINDLEY, L.J. This is an appeal from a decision of Butt, J., refusing an application by the wife for the costs of divorce proceedings. She petitioned for dissolution of the marriage, and her husband presented a cross-petition with the same object. She at first was successful, and obtained a decree nisi. The Queen's Proctor intervened, and the result was that the decree was rescinded on the ground of collusion. She afterwards applied for her costs, of which there are two sets, the costs up to and including the trial at which the decree nisi was obtained, and the subsequent costs occasioned by the intervention of the Queen's Proctor. Butt, J., refused to give her either. The first set of costs come within the Divorce Act of 1857, s. 51, and there cannot be an appeal as to them. That section, however, does not

1890

BUTLER v. BUTLER.

Lindley, L.J.

appear to apply to the intervention costs; but there the Judicature Act leads to the same result. Butt, J., says: "You ask me to give you the costs of these proceedings, which were occasioned by your collusion. In my opinion you deserve none." How can it then be contended that he did not exercise his discretion? *Flower* v. *Flower* (1) was referred to as laying down a rule with regard to the disallowance of the wife's costs; but where an Act says that costs shall be in the discretion of the judge, I think that it is not competent to any judge to lay down a rule which shall fetter other judges in the exercise of their discretion.

LOPES, L.J. In my opinion all the costs here in question were costs within the discretion of the judge, and cannot be made the subject of an appeal. *Flower* v. *Flower* (1) does not bear on the question we have to decide, for it was a case of original application, not of appeal. In *Robertson* v. *Robertson* (2) an appeal as to costs was allowed, but it was not an appeal from the discretion of the judge below, for he had held that he could not give costs beyond the sum deposited in the registry, and whether he could do so or not was a question of principle.

COTTON, L.J. I observed during the argument that the point that there could not be an appeal as to costs which were within the discretion of the judge was not taken in *Robertson* v. *Robertson* (2); but if it had been taken, I do not think that it could have been sustained. The judge had not said that in his discretion he thought the wife ought not to have costs beyond the sum deposited, but that in his opinion he had no power to give her more.

Appeal dismissed.

Solicitors for wife: *Clinton & Buckley.*

Solicitors for husband: *Goldring, Mitchell & Co.*

(1) Law Rep. 3 P. & D. 132. (2) 6 P. D. 119.

H. C. J.

CORNISH *v.* CORNISH.

1890
April 1.

Divorce—Wife's Confession only Evidence—Motion to dispense with Co-respondent refused—Personal Service of Citation ordered—Divorce Act, 1858 (20 & 21 *Vict. c.* 85), *s.* 28.

In a petition by a husband for divorce, it appeared that the address and occupation of the alleged adulterer were known to the petitioner, but there was no evidence against him except the respondent's confession :—

Held, that the petitioner could not be excused from making the adulterer a co-respondent, and that the citation must be personally served upon him as such co-respondent.

THIS was an application on behalf of the petitioner in a suit for dissolution of marriage, to proceed without joining Stiles Northrop as a co-respondent, on the ground that the only evidence against him consisted of the wife's confessions, or in the alternative to dispense with personal service of the citation. He also asked to be excused from citing certain unknown persons who had committed adultery with his wife.

The petitioner, in his affidavit, swore that he believed the said Stiles Northrop to be a printer, resident at 252, West 14th Street, New York; and that he had used his best endeavours to obtain evidence corroborating his wife's verbal and written statements with regard to her alleged adultery with this man, but without success.

Searle, for the petitioner, in support of the motion.

BUTT, J., said that where, as in the case of Northrop, the identity of the alleged adulterer was known to the petitioner, the Court, acting upon the terms of s. 28 of the Divorce Act, 1858 (20 & 21 Vict. c. 85), ought to insist on his being made a co-respondent. The fact that there was no evidence against him but the wife's confessions did not dispense with the necessity. The petitioner would have leave, in this case, to dispense with any co-respondent, other than Stiles Northrop, but the petitioner must cite and personally serve the said Stiles Northrop.

Solicitors: *Dixon, Ward & Co.*

W. L.

1890
April 1.

[IN THE COURT OF APPEAL.]

IN RE CLOOK.

Probate — Practice — Appeal — Non-contentious Business — Refusal to grant Letters of Administration — Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Probate Act,* 1857 (20 & 21 *Vict. c.* 77), *s.* 2.

A person claiming to be a creditor of an intestate applied for letters of administration, having cited the next of kin, who did not appear. The judge refused the grant, holding that the applicant was not a creditor of the intestate. The applicant appealed:—

Held, that, whether the application was contentious or non-contentious business, as to which the Court gave no opinion, there was, under s. 19 of the Judicature Act, 1873, an appeal from the judge's decision to the Court of Appeal.

THIS was an ex parte motion by way of appeal from an order of Butt, J., refusing to grant letters of administration of the estate of J. J. Clook, an intestate, to Sarah Charles.

The applicant claimed to be a creditor of the intestate under a parol promise alleged to have been made by him in 1864, that if the applicant would come and reside with him he would adopt her as his daughter, and would leave her, after his death, whatever he possessed after payment of his just debts. The applicant stated in her affidavit that, in reliance upon this promise, she went to reside with the intestate, and continued to do so until 1887, when she found it necessary to leave him in consequence of certain improper proposals which he made to her. The intestate died on March 12, 1888, leaving several brothers and sisters his sole next of kin. The applicant cited the next of kin, but none of them appeared, and she accordingly applied for a grant of letters of administration to herself, as a creditor for damages for breach of the alleged contract by the intestate to leave her his property by will. The judge held that the applicant had no claim as a creditor of the intestate, and refused the grant.

The applicant now renewed the application before the Court of Appeal.

Henderson, for the applicant.

[COTTON, L.J. Is not this non-contentious business, and, if so, is there any appeal from the decision of the judge?]

The application is contentious within the meaning of the Probate Court Rules, which, by the Judicature Act, 1875, s. 18, are made applicable to the Probate Division. By the Probate Court Rules, 1862 (Coote and Tristram's Probate Practice, p. 583), non-contentious business includes all common form business, as defined by the Probate Act, 1857 (20 & 21 Vict. c. 77). By s. 2 of that Act, "Common form business shall mean the business of obtaining probate and administration where there is no contention as to the right thereto . . . and all business of a non-contentious nature to be taken in the Court in matters of testacy and intestacy, not being proceedings in any suit." This was treated by the judge as contentious business, for it was heard in Court and not before the registrar, and a barrister was heard on it, which is not usual in non-contentious cases. But even if the matter is non-contentious, there is an appeal from the decision of the judge. Sect. 19 of the Judicature Act, 1873, is quite general. It enacts that the Court of Appeal shall have jurisdiction to hear appeals "from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice or any judge or judges thereof." There is no enactment in the Judicature Act which excludes non-contentious business from the benefit of this section; and by Order LVIII., r. 10, where an ex parte application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal ex parte. *In re Pridham* (1) was a similar application for a grant of administration, and there an appeal was allowed.

COTTON, L.J. Without giving any opinion whether this application is contentious or non-contentious business, I think that the 19th section of the Judicature Act, 1873, covers this case, and that the applicant has a right to appeal. There may be some kinds of non-contentious business with respect to which it would not be right to allow an appeal; but here I feel no doubt that the applicant is entitled to bring one.

LINDLEY, L.J. I also express no opinion whether this is contentious or non-contentious business; but whether it is or not, I think the applicant has a right to appeal under s. 19.

(1) 61 L. T. 302.

1890

IN RE CLOOK.

LOPES, L.J. I am not prepared to say whether this is contentious or non-contentious business; but, whichever it is, I am of opinion that there may be an appeal under s. 19 of the Judicature Act. The appeal may, therefore, proceed.

The appeal was then heard; but the Court was of opinion on the evidence that there was no contract between the applicant and the intestate, and that the judge was right in refusing to grant letters of administration. The appeal was, therefore, dismissed.

Solicitor: *J. J. Winser, for Woosnam & Crowdy, Newton Abbott.*

M. W.

June 10.

THE ISLE OF CYPRUS.

Practice—Interrogatories—Collision.

In an action of damage arising out of a collision in which the plaintiffs' vessel was lost, with all of the crew who could give evidence as to the collision, the plaintiffs were allowed to administer interrogatories to the owners of the defendants' vessel as to the circumstances of the collision.

MOTION by the plaintiffs in an action for damage by collision for an order to direct that the defendants should file further and better answers to the plaintiffs' interrogatories. The plaintiffs were the owners of the steamship *Cleddy*, and the defendants were the owners of the steamship *Isle of Cyprus*. The *Cleddy* was sunk by a collision between the two vessels, and all the crew who were on deck at the time were drowned.

The object of the interrogatories was to obtain from the defendants information as to the facts of the collision. The defendants answered the first five interrogatories, as to the date of the collision, the ownership of the *Isle of Cyprus*, her course before the collision, and as to the officer and crew on watch. They refused to answer the remaining interrogatories on the ground that they were not material at that stage of the proceedings, that they were exhibited unreasonably and vexatiously, that they were oppressive and unnecessary, and were an attempt to obtain that part of the defendants' case which they only knew from documents which were privileged.

The statement of claim had not been delivered.

Barnes, Q.C., for the plaintiffs. It is essential that the plaintiffs should obtain information as to the circumstances of the collision. No doubt interrogatories are not usually administered to obtain information as to a collision; but this is a special case.

Raikes, for the defendants. In addition to the reasons given in objection to answering, these interrogatories seek to find the defendants' case before the plaintiffs file their pleadings. At any rate, facts stated in the preliminary act should not be given in the answers.

He referred to *The Biola* (1) and *The Radnorshire.* (2)

BUTT, J. These interrogatories must be answered. It is not usually the practice in this Court to give in the answers the facts stated in the preliminary acts; but as the plaintiffs desire to have the facts on oath, the interrogatories must be answered fully.

Solicitors for plaintiffs: *T. Cooper & Co.*

Solicitors for defendants: *Waltons, Johnson, & Bubb.*

E. S. R.

THE MARK LANE.

June 24.

Salvage—Inequitable Agreement—Compulsion—Costs.

A steamer fell in with another steamer in the Atlantic, which had lost part of her propeller, was leaking, and could not use her engines. The vessel in distress was towed by the other vessel to Halifax, a distance of about 350 miles. Before the service was begun the masters of the salving and salved vessels signed an agreement that the owners of the salved vessel should pay 5000*l.* for the service or a sum for work done if it was unsuccessful. The master of the salving vessel would not take a less sum, and the master of the salved vessel had reasonable grounds for believing and believed that his vessel would be abandoned if he did not sign the agreement. The sum of 5000*l.* was more than one-fifth of the total value of the salved vessel, her cargo and freight:—

Held, that the agreement must be taken to have been made under compulsion, and could not be enforced, having regard to the fact that the sum stipulated for was exorbitant.

The Court, treating the agreement as inoperative, awarded the salvors 3000*l.* as a fair remuneration for the services, and allowed them their costs of the action.

ACTION OF SALVAGE. The plaintiffs were the owners, master, and crew of the steamship *Crete*, and the defendants were the

(1) 34 L. T. 185. (2) 5 P. D. 172.

1890

THE MARK LANE.

owners of the steamship *Mark Lane*, her cargo and freight. The *Crete* was 1121 tons net register, with engines of 140 horse-power nominal, working up to 700, and was manned by a crew of twenty-two hands all told; her value was 18,000*l.*, that of her cargo 10,000*l.*, and of her freight 2062*l.* The *Mark Lane* was of 1354 tons register, her value was 15,000*l.*, that of her freight 935*l.*, and that of the cargo 7708*l.*, and she was on a voyage when the services were rendered from New Orleans to Belfast. On April 13, 1890, the *Crete* fell in with the *Mark Lane* in the Atlantic Ocean in about latitude 39·55 N. and longitude 60·2 W.; she had lost two blades of her propeller, was leaking in her stern in consequence of the increased vibration, and her engines had to be stopped and could not be used. The master of the *Crete* offered to tow the *Mark Lane* to Halifax for the sum of 5000*l.*, and also stipulated that he should be paid for services rendered if the *Mark Lane* was not brought into port. As the master of the *Mark Lane* thought it unwise to be left in the position he was, with his vessel in her damaged state, and as the master of the *Crete* would not take a less sum, a written agreement to the above effect was signed by the two masters. The *Mark Lane* was then taken in tow, and arrived in Halifax on April 16. The plaintiffs in the action claimed the said sum of 5000*l.*, or in the alternative such a sum as the Court might think proper.

The defendants contended that the said agreement was not binding upon them, on the ground that it was unreasonable and exorbitant, and that it was signed under duress, and because the master of the *Mark Lane* believed that if he did not sign it he would not be towed to a port of safety by the *Crete*.

Barnes, Q.C., and *Aspinall*, for the plaintiffs.

Sir W. Phillimore, and *Walton*, for the defendants.

[The following cases were cited: *The Medina* (1); *The Silesia* (2) *The Cargo ex Woosung.* (3)]

BUTT, J. The values of these two steamers, though not large, are considerable. The plaintiffs are seeking to recover the

(1) 2 P. D. 5. (2) 5 P. D. 177. (3) 1 P. D. 260.

sum of 5000*l.* as due to them by agreement, and not as is usually the case, asking the Court to award such an amount of salvage as it may deem just. I feel satisfied that for services such as those rendered in this case the Court of Admiralty never has given such an award as 5000*l.*, and I think, having regard to the state of the *Mark Lane*, the distance she was towed, and that 5000*l.* is more than one-fifth of the total value of the salved property, the plaintiffs' demand is exorbitant. I think it would be so were this simply a salvage agreement; but it is not—far from it. One reason why salvage awards are so large is because, if the service is unsuccessful, at whatever risk and labour it may have been performed, the salvor gets nothing. But by this agreement, in the event of the *Mark Lane* going down, the plaintiffs were still to be paid for their services. Thus it is an agreement for 5000*l.* if the services are successful, and for payment for services rendered if unsuccessful. I have said that I consider the demand exorbitant. In the cases referred to by counsel, the word "inequitable" has been used. But I think that what is at the root of the question is this—where it is found that a wholly unreasonable price has been insisted upon by the salvors and an agreement incorporating it has been signed, the Court looks rather to the position of the parties than to the reasonableness or unreasonableness of the amount. Were the parties, in fact, contracting on equal terms? It is clear that in the present case they were not. It is true that there is not in this case the amount of duress which would invalidate an agreement at common law; but in this Court the same amount of compulsion or duress—call it what you will—is not necessary to induce the Court to refuse to enforce an agreement. The captain of the *Crete* appears to have said, though not in so many words, "If you do not sign this agreement to pay 5000*l.*, I will leave you." His manner and demeanour were such that they led the captain of the *Mark Lane* to believe that that was what he meant to do, and he has not from first to last said that he would either have taken less or have stayed by the *Mark Lane*. The fact is that the master of the *Mark Lane* signed this agreement under compulsion, and, the amount being exorbitant, I decline to uphold the agreement. Then the question arises,

1890

THE MARK LANE.

Butt, J.

What sum are the salvors entitled to receive? Considering that the weather was fine during the greater part of the time during which the service was rendered, and that there was little risk to the salvors—no more than is necessarily incurred when a large steamer takes a still larger one in tow—and that the towage was about 350 miles, we think that 3000*l.* will be a liberal award. As I am asked to apportion the amount, I direct that 2500*l.* shall be paid to the owners of the *Crete*, 150*l.* to the master, and 350*l.* to the officers and crew according to their rating.

Sir W. Phillimore, for the defendants. I ask that judgment may be for the plaintiffs without costs, according to the practice of the Court in similar cases: *The Medina* (1); *The Silesia* (2); *The Cargo ex Woosung.* (3)

Aspinall, for the plaintiffs. The plaintiffs have recovered on their alternative claim.

BUTT, J. There has been no tender in this case, and the plaintiffs have recovered a large sum. The Court is desirous of acting so far as possible in conformity with the practice in the other divisions of the High Court. The plaintiffs must have their costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Pritchard & Sons.*

(1) 2 P. D. 5. (2) 5 P. D. 177.

(3) 1 P. D. 260.

E. S. R.

THE RUBY.

1890
June 5, 10.

Admiralty—Collision—Compulsory Pilotage—River Burry—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 353—6 & 7 *Vict. c. lxxxviii.—Counter-claim—Costs.*

Pilotage in the case of vessels trading to the port of Llanelly was by law compulsory before the Merchant Shipping Act, 1854, and, therefore, by s. 353 continues to be compulsory.

In an action of damage arising out of a collision the plaintiffs' claim was dismissed without costs, the Court having found that the defendants' vessel was alone to blame for the collision, but that they were exempt from liability on the ground of compulsory pilotage. The defendants had counter-claimed:—

Held, that, under the circumstances, the plaintiffs were entitled to have the counter-claim dismissed with costs.

ACTION of damage by collision. The plaintiffs were the owners of the *Cambrian*, and the defendants were the owners of the steamship *Ruby*, of 184 tons register. The collision, the subject of the action, took place in the Burry River, each vessel at the time being bound for the port of Llanelly.

The learned judge found on the facts that the collision was caused by the bad navigation on the defendants' vessel, and that such bad navigation was solely caused by the fault of the pilot in charge. The defendants having (inter alia) pleaded that they were exempt from liability on the ground of compulsory pilotage the case was reserved for argument on this point.

June 10. *Sir W. Phillimore* (*Aspinall*, with him), for the defendants. Pilotage was compulsory in the case of vessels bound for the port of Llanelly. By the Merchant Shipping Act, 1854, s. 353, pilotage is to continue to be compulsory in all districts in which the same was by law compulsory immediately before the passing of the Act, subject to any subsequent alteration. By bye-law No. 11 of April 27, 1814, made under the powers of 53 Geo. 3, c. clxxxiii. (1813) (Local and Personal), pilotage was made compulsory. Subsequently, 6 & 7 Vict. c. lxxxviii. (1843) (Local and Personal) was passed, reciting the former Act, and bye-laws, made in 1844, were made under s. 158 (1) of this Act.

(1) Sect. 158: "And be it enacted, that it shall be lawful for the Commissioners from time to time to make such bye-laws as they shall think fit for all or any of the following purposes (that is to say) . . . For regu-

1890

THE RUBY.

[They referred to bye-laws 1 and 2. (1)] These were in force when the Merchant Shipping Act, 1854, became law.

[BUTT, J. It now rests with the plaintiffs to shew that pilotage was not compulsory. The defendants have made out a primâ facie case.]

Barnes, Q.C., and *Raikes*, for the plaintiffs. Pilotage was not compulsory. The bye-laws are ultrà vires as regards compulsory pilotage. 6 & 7 Vict. c. lxxxviii., s. 158, did not give power to make pilotage compulsory. [They referred to subsequent local Acts, namely, 21 & 22 Vict. c. lxxii., and 27 & 28 Vict. c. cciii.] Secondly, this was a vessel engaged in the "regular coasting trade," and so exempt from compulsory pilotage under 6 Geo. 4, c. 125, s. 59, which exemptions are retained by the Merchant Shipping Act, 1854, s. 353.

Sir W. Phillimore, in reply. The exemption in 6 Geo. 4, c. 125, is only applicable to places to which that Act applies—it is not a general exemption.

[BUTT, J. I am with you on that point.]

BUTT, J. I have no doubt that pilotage was by law compulsory on vessels trading to this port, Llanelly, at the time when the Merchant Shipping Act, 1854, came into operation, and, therefore, by the terms of that statute it continued to be compulsory. It appears that the harbour authorities have made bye-laws since making pilotage, if they have any operation at all, compul-

---

lating the entrance and departure of vessels resorting to the said harbour and rivers, and the pilotage, good behaviour and conduct of seamen, pilots, hobblers, watermen, and others employed in or upon the said rivers, and the nomination, appointment, and removal of such pilots, hobblers, watermen, and others, and the payment and reward to be made or given to them, and the mooring time and accommodation of such vessels."

(1) First: "All vessels registering thirty tons and upwards passing over the bar of Burry, either inwards or outwards, and all vessels with cargoes though under that tonnage inwards shall heave to and shall receive on board the first licensed pilot who shall offer, and the master of any vessel refusing or neglecting to do so shall pay the pilotage as though such pilot had been taken on board, and be subject to a penalty not exceeding five pounds."

Second: "Masters of vessels shall employ a licensed pilot, if one shall offer, in transporting their ships within the port, for which they shall pay according to the rates hereinafter specified."

sory. I can see no ground upon which it can be said that this vessel was not obliged to take a pilot. It is unnecessary that I should state the lengthy preamble and clauses of 6 & 7 Vict. c. lxxxviii., or the terms of the bye-laws which have been referred to by counsel. The Merchant Shipping Act, 1854, was passed at a time when, as a matter of fact—although as a matter of law it has been questioned in this case—pilotage was compulsory. Vessels were, in fact, taking pilots as if they were compelled to do so. Therefore, I am of opinion that pilotage was compulsory on the *Ruby*. I must accordingly dismiss the suit without costs.

There being a counter-claim by the defendants, the question as to the manner in which the costs of this part of the case should be treated arose, and Butt, J., reserved the point for the practice to be inquired into.

June 11. BUTT, J. As regards the costs of the counter-claim, the Registrar has supplied me with two precedents, namely, *The Cambria* (1887, Fo. 76) and *The Capella* (1887, Fo. 369), in which, under similar circumstances, the counter-claim was dismissed with costs. Therefore the defendants must pay the costs incidental to the counter-claim.

Solicitors for the plaintiffs: *Pritchard & Sons.*
Solicitors for the defendants: *T. Cooper & Co.*

E. S. R.

1890
May 20, 21.

FIVE STEEL BARGES.

Salvage—Contract of Towage—Property in salved Vessels—Action in personam.

The plaintiffs, the owners of a steam-tug, entered into a contract with the defendants, who were in possession of five steel barges, by which the tug was to tow the barges from Chepstow to Portland for an ascertained sum. The tug and barges during the progress of the towage were twice obliged to seek shelter, and the barges twice broke adrift and had to be saved by the tug, and on one of these occasions the tug saved the lives of some of the bargemen. At the end of the towage two of the barges were given up to the Government, with whom the defendants were under a contract to build and deliver the barges. An action of salvage was brought in personam against the defendants in respect of alleged salvage services to these two barges, and in rem against the remaining three barges:—

Held, that the plaintiffs were entitled to salvage, and that an action in personam would lie against the defendants.

ACTION of salvage. The plaintiffs were the owners and crew of the steam-tug *White Rose*, and the defendants were Edward Finch & Co., Limited, who at the time when the services, the subject of the action, were rendered, had possession of five steel barges—Nos. 68, 69, 70, 71, and 72. On January 13, 1890, the plaintiffs entered into an agreement with one Guy, as agent for the defendants, whereby, in consideration of 85*l.*, the plaintiffs undertook to tow these barges from Chepstow to Portland by their steam-tug *White Rose*, subject to the condition that, if any or all of these barges broke adrift and were lost, the plaintiffs were still to be entitled to the above sum.

On January 16 the *White Rose* took the barges in tow, two men being on each barge, the barges being made fast one astern of the other. At 2 P.M. on January 17, it came on to blow so hard that the tug and barges had to anchor under the shelter of Lundy Island, barge No. 68 being anchored, and the others fastened to her, and the tug being anchored at a short distance off.

It was not till January 27 that the barges and tug could leave the shelter of Lundy Island, owing to the continued stormy weather. In the channel a heavy sea was encountered, and four of the five barges then broke adrift. The *White Rose* proceeded back to Lundy Roads with No. 68, and then returned in search of the others. With much difficulty the barges were brought

back to shelter. On the 28th the towage was again begun, but the barges again broke adrift, and three men were drowned, and three of the barges were adrift for a long time. Nos. 70, 71, and 72 were finally towed to Cardiff by the steamer *Dunrobin*, and Nos. 68 and 69, by the *White Rose*, to Portland. Fifteen days instead of six were occupied in this service. The plaintiffs now claimed salvage for services over and above those contemplated by the contract for towage: the action was in rem against barges Nos. 70, 71, and 72, and in personam against the late owners of Nos. 68 and 69, these barges having been given up to the Government before any lien was asserted, the defendants being under contract with the Government to deliver them within twelve months.

The defendants pleaded that the plaintiffs' services were not salvage services, and that any right which they might have had for salvage they had lost as regards Nos. 68 and 69, by giving up possession of them without preserving their lien or obtaining bail in respect of their claim; and also that barges Nos. 68 and 69 were not the property of the defendants at the time of the institution of this action.

Barnes, Q.C., and *Pyke*, for the plaintiffs. The plaintiffs are entitled to salvage. The services were more than towage services: *The Kingalock*. (1) The defendants had an interest in the barges being delivered safely to the Government, and therefore a service was rendered to them personally.

Bucknill, Q.C., and *Raikes*, for the defendants. The services rendered were contemplated by the contract, and salvage is not due: *The Neptune*. (2) The plaintiffs have lost any right they possessed against barges Nos. 68 and 69 by giving up these barges: *The Chieftain* (3); *The Rapid*. (4) The defendants had no property in these barges: *Ex parte Lambton*. (5)

Barnes, Q.C., in reply.

THE PRESIDENT. The first question in this case is whether or not, as a matter of fact, the services which were rendered by the

(1) 1 Spinks, 263.
(2) 1 Wm. Rob. 297.
(3) 4 N. of Cas. 459.
(4) 3 Hagg. 419.
(5) Law Rep. 10 Ch. 405.

1890

FIVE STEEL BARGES.

The President.

tug were of such a character, and were rendered under such circumstances, as to take them out of the towage contract. From the examination I have given to the decisions in point, it appears to me that it is not necessary, in order to become entitled to salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into such a contract. It depends on the circumstances of each case whether or not the services are advanced in this way to a higher degree, so as to establish a right to salvage. I have very carefully considered this matter with the Trinity Brethren, and we have come to the conclusion that, in some particulars, salvage services have been rendered. The character of the contract is, of course, to be looked at, and the circumstances to which it related, before we arrive at the point from which we have to start in estimating the value of the higher class of services. This was a towage of a very peculiar character, and those who undertook it must have known that it would be a difficult operation at that time of the year, towing, as they would, through a very exposed and dangerous tract of the sea. They must be assumed to have taken that into consideration when they made the bargain to do this peculiar work for 85*l*. They must also have taken into consideration that they were liable to delays, although they could not have contemplated so long a delay as was necessarily incurred in consequence of the extreme violence of the weather. No doubt it was somewhat longer than could have been expected; but I do not attach great importance to the delay. But, undoubtedly, there did supervene some additional operations to be performed which, I think, cannot be considered as within the towage contract. Then arises the question, whether the tug was justified in going to Lundy. It has been said that that was wrong. I am advised that it was not an improper thing to do. There may possibly be a difference of opinion as to whether it would have been better to go to some other place; but at the utmost that can only be put as an error of judgment, if, indeed, it was that. I am, however, very strongly advised that it was highly injudicious to put to sea from the shelter of Lundy. After the stormy

weather which had prevailed for so long a time, any nautical man ought to have known that, in such circumstances, to tow a string of barges was to expose them to extreme danger, as the result proved, for they began to break adrift as soon as they got outside the shelter of Lundy. Therefore, in estimating the value of the plaintiffs' services, I do not take into account the return to Lundy. But one of the barges—No. 71—was fouled by a steamer, which rendered it necessary that the tug should go to its assistance, and extricate it from the position of danger it was in; and at the same time barge No. 72 was taken to a position of greater safety. That, I am of opinion, was a salvage service, arising as it did, from necessity, outside the contract. We are also of opinion that there was life salvage, in taking the men out of the sea after the boat had been upset by the tightening of the hawser. It seems to me to be perfectly clear that that was an accident for which no blame is imputable to the tug. The rising and falling of the sea would naturally cause a loosening and tautening of the rope, and, unfortunately, the boat got across the rope at a time when it was slack. The tug saved the lives of two men, and for that I think there should be an award, if there is property saved to which life salvage can attach. Then certain men were taken off one of the barges which went adrift. I think there can be no doubt that, at the time those men were taken off, everyone believed they were in danger, and though it was possible, and afterwards was the fact, that these men would have been saved by the barge being picked up by the steamer, yet I think there was some salvage service rendered to those men. Having regard to the circumstances which existed at the time, it was not certain that the barge would be picked up, and therefore I think that life salvage is due in that respect. I therefore come to the conclusion that a sum is to be awarded as salvage for the extraordinary exertions which became necessary over and above those which were reasonably contemplated as within the towage contract.

But it is argued that the plaintiffs are not entitled to recover, because, as against Nos. 68 and 69, they are not asserting their right as having a maritime lien, but have instituted their action in personam. The reason for doing this is, because these barges

1890

FIVE STEEL BARGES.

The President.

are now in the possession of the Government, for whom they were made by the defendants. Those remarks do not apply to the other three barges, as to which a lien was asserted before they were given up to the government.

As to the two which have been given up to the Government, I think it is perfectly clear on the authorities that an action in personam lies against the owners of a vessel which has been saved, even though the property has been transferred to others, and the lien lost. In this case, however, the property does not appear to have been in the defendants, because it would, I think, under the contract, to which reference has been made, be in the Government. But on this point I am of opinion that the right to sue in personam is not confined to the case of the defendant, being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the Court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think, if Mr. Barnes' argument is well founded—viz., that those instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract—it would follow that, if defendants had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract, or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears

to me, therefore, that they had substantially an interest to the full amount of the barges at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property. That is certainly the business-like view of the matter; and I do not forget that the defendants insured themselves to the full value of these barges, and described themselves as being the owners. In conclusion, I award 200*l.* as salvage, independently of the towage contract.

Solicitors for the plaintiffs: *Fielder & Sumner, for T. H. Stephens, Cardiff.*

Solicitors for the defendants: *Botterell & Roche, for Vaughan & Hornby, Cardiff.*

E. S. R.

IN THE GOODS OF CALLAWAY.

May 13.

Probate—Two Wills—Estate in England and South Africa—Independent Disposition.[1]

A testator died possessed of property in England and South Africa. He executed two wills, one disposing of his English estate and the other of his South African estate, each purporting to be independent of the other, and intended to have no operation on the property disposed of by the other:—

Held, that probate might be granted of the English will without requiring the South African will to be brought in, on an affidavit being filed exhibiting an attested copy of it, and a statement being inserted in the probate that such affidavit had been filed.

THE Right Rev. Henry Callaway, late Bishop of St. John's, Caffraria, died March 26, 1890, at Ottery St. Mary, in the county of Devon. On January 17, 1888, being then resident in this country, and having resigned his bishopric, he made two wills, one disposing of his property in England, and the other disposing of his property in South Africa. The English will commenced in these terms: "This is to be my last will and testament so far only as respects my real and leasehold estate and my personal estate and bona notabilia in the United Kingdom of Great Britain and Ireland, and is not intended in any way to operate as disposing of my personal and real estate in South Africa or

1890

IN THE GOODS OF CALLAWAY.

elsewhere than in the said United Kingdom, as to which I have made a separate and independent will dated on the same day as this, and therein called my African will." In the South African will the testator said, "I declare this to be my last will and testament except as to such real, leasehold, or personal estate, if any, as may be situate in Great Britain."

This will had been sent to South Africa to be proved; but on the executors of the English will taking it into the Principal Registry for Probate, the registrar refused probate unless the South African will were brought in.

B. Deane moved for probate of the English will alone to be granted to the executors, without calling on them to bring in the South African will, and stated that all the next-of-kin consented to this course. [He referred to *In the Goods of Coode*, (1) *In the Goods of Smart*, (2) and *In the Goods of Astor*. (3)]

BUTT, J. I think I can do for you what appears to have been done in that last case. I will direct that probate may be issued of the English will alone to the executors named therein; but an affidavit must be filed exhibiting an attested copy of the South African will, and that affidavit must be referred to in the probate as having been filed.

Solicitors: *Currie, Williams, & Currie.*

(1) Law Rep. 1 P. & D. 449. (2) 9 P. D. 64.
(3) 1 P. D. 150.

W. L.

IN THE GOODS OF MARY HORNBUCKLE.

1890
May 20

Probate—Will of Married Woman—Will disposing of Realty only—Power of Appointment—Realty vested in Testatrix—Outstanding Grant of Administration to Personalty.

The testatrix, a married woman, made a will disposing of realty only, and appointing three executors. The testatrix under the provisions of a deed had a power of appointment over the realty, and in default of such appointment it was declared that the realty should be vested in her for her sole and separate use. She never exercised the power; and after her death her husband took out letters of administration to her personal estate on the ground that she had died intestate except as to realty:—

Held, that the testatrix must be regarded as in the position of a feme sole with regard to the real estate, and that the will therefore might be admitted to probate; but the Court declined to make a grant until the existing grant of administration had been revoked.

APPLICATION for a grant of administration, with the will annexed, of the estate of Mary Hornbuckle, deceased, to one of the devisees under the will.

By a deed executed December 23, 1863, Mary Hornbuckle was seised of and entitled to certain real estate, with a power of appointment "to the use of such persons and upon such trusts and for such purposes and interests as she might appoint," and in default of any such appointment "to the sole and only proper use and behoof of the said Mary Hornbuckle, her heirs, and assigns, and for her own use and benefit, free from control, debt or interference of her husband."

By her will, dated December 24, 1863, she devised this estate to her husband and children, and the will, after reciting the deed of December 23, 1863, proceeded thus: "Therefore I, in pursuance, exercise, and execution of the power or authority contained, given, or reserved to me in and by the said recited indenture, and of all and every power and powers, authority and authorities whatsoever me hereunto enabling, do hereby direct," &c.

The will appointed three executors, Francis Hornbuckle, her husband, G. A. Plant, and William Bates, one of whom had renounced and another had died.

The deceased's estate consisted entirely of realty, and the will

1890

IN THE GOODS OF HORNBUCKLE.

did not purport to dispose of any personal property. The testatrix died in March, 1864, and in July, 1864, a grant of administration to her personal estate was made to her husband, Francis Hornbuckle, on the ground, as stated in the grant, that she had died intestate except as to realty.

E. Ford, moved for a grant of administration, with the will annexed, to one of the devisees, and submitted that the testatrix had not only a power of appointment over the realty disposed of, but that she was absolutely entitled to it in her own right under the deed of 1863, and had the power of devising it. She was therefore in the position of a feme sole, and *In the Goods of Jordan* (1) decided that the will of a man or a feme sole, though it disposes of realty only, if it appoints executors, is entitled to probate.

[BUTT, J. Does not that case conflict with *O'Dwyer* v. *Geare*? (2)]

The difference between the two cases is this, that in the latter case the testatrix had merely a power of appointment, and she only exercised that power, whereas in *In the Goods of Jordan* (1) the testatrix had the estate and devised it. So in this case, the testatrix was entitled to the property for her own separate use, and it makes no difference whether she appointed or not. The will, therefore, is entitled to probate. [He referred also to *Brownrigg* v. *Pike*. (3)]

Searle, for F. Hornbuckle, the husband of the testatrix. No such grant as this has ever been made, or can be made, to the devisee of real estate, and if it were made it would give no power over the real estate. In *In the Goods of Jane Barden* (4), where there was a will, made by a married woman under a power, dealing with realty and appointing executors, Lord Penzance held that that did not give the Court jurisdiction to grant probate of a will disposing of real property only.

[BUTT, J. Here the testatrix had not merely power to appoint, but had the estate.]

If she had exercised the power in her own favour and had

(1) Law Rep. 1 P. & D. 555.
(2) 1 S. & T. 465
(3) 7 P. D. 61.
(4) Law Rep. 1 P. & D. 325.

given the estate to herself there might have been something in the point.

[BUTT, J. But the deed provides that if she makes no appointment the estate is to be held to her own separate use.]

There is this further difficulty, that a grant of administration of the personalty of the testatrix has already been made to F. Hornbuckle on the ground that she died intestate except as to realty. If a grant is made according to the application, there will be a double representation of the estate—two grants existing representing the same estate, which is unprecedented. The former grant must be revoked before another grant can be made.

Ford, for the applicant, asked that the motion might stand over for the purpose of obtaining a revocation of the former grant.

Searle, contrà. An existing grant cannot be revoked on motion—it must be by action.

BUTT, J. I do not see that anything can be gained by allowing the motion to stand over. My view of the matter is, that although the authority of the cases goes to this, that where a man or a feme sole dies, devising by will real property only, but appointing an executor, that executor is entitled to have the will proved—that would have no application in the case of a married woman merely appointing under a power given by deed. But in this case it is pointed out, that not only had the testatrix a power of appointment given her by the deed, but that she had a vested interest in the real property apart from that power, and that she has really exercised not only what rights she had under the power, but the rights which she had beyond it. She was therefore, quâ this property, in the position of a feme sole. But for one other circumstance I should be prepared, on the authority of the cases cited, and especially having regard to the decision of Sir J. Hannen in *In the Goods of Tomlinson* (1), where he points out the real principle on which the Court should act, to hold the executor entitled to probate of this will. But now comes this difficulty, that administration of this lady's estate

(1) 6 P. D. 209.

1890

IN THE GOODS OF HORNBUCKLE.

Butt, J.

has already been granted to her husband. That is an existing grant; and under the circumstances it appears to me impossible to make a grant to anybody else. While that grant remains unrevoked I cannot grant probate of this will. The application must be refused.

Solicitors for applicant: *Pitman & Sons.*

Solicitors for F. Hornbuckle: *Dangerfield & Blythe.*

W. L.

June 4, 24.

WARTER *v.* WARTER.

Probate—Will—Revocation by Marriage—Indian Divorce—Marriage of Parties in England within Six Months of Final Decree—Indian Divorce Act, 1869, *No.* 4, *s.* 57.

The prohibition contained in the 57th section of the Indian Divorce Act of 1869, No. 4, against the remarriage of either party within six months of the date of the final decree is an integral part of the proceeding, and a condition which must be fulfilled before the parties can contract a fresh marriage, and they cannot evade it by obtaining a domicil in another country.

A respondent and a co-respondent in a divorce suit in India, in which a decree absolute was pronounced on November 27, 1879, came to this country and were married on February 3, 1880. On February 6 the co-respondent duly executed a will by which he bequeathed all his property to his "reputed wife." On April 2, 1880, the parties went through a second form of marriage:—

Held, that the first marriage, having been celebrated within six months from the date of the final decree of divorce, was invalid, and that the will was revoked by the subsequent marriage.

Scott v. *Attorney-General* (11 P. D. 128) distinguished.

THIS was a suit to determine the validity of a will of Colonel Henry De Grey Warter, bearing date February 6, 1880. It was propounded by Ellen Annette Warter, the daughter of Colonel Warter, through her guardian, and Henry De Grey Warter, the son of Colonel Warter, through his guardian, opposed probate on the ground that the will had been revoked by the subsequent marriage of the father, and prayed that administration to the estate of his father might be granted to him as his only natural and lawful child.

At the hearing before the President, it appeared that in 1879, Mr. Tayloe, a broker resident in Calcutta, and an English subject and a Christian, brought an action of divorce under the Indian

Divorce Act of 1869, in the High Court of Judicature at Calcutta, against his wife, an English subject and a Christian, also resident in India, on the ground of her adultery with Colonel De Grey Warter, an officer in the Royal Artillery, then serving with his battery in the North West Provinces.

A decree nisi dissolving the marriage was pronounced on May 19, 1879, which was made absolute on November 27, 1879. By the Indian Divorce Act, No. 4 of 1869, s. 57, it is provided that it shall be lawful for either the petitioner or respondent in a divorce suit to marry again after a period of six months from the date of the decree dissolving a marriage if no appeal has been presented, but not sooner. Pending the action, which was undefended, Mrs. Tayloe came to this country, Colonel Warter followed her, and on February 3, 1880, being less than three months after the date of the final decree, they were married. On February 6, Colonel Warter executed the will now in dispute, by which he bequeathed all his property real and personal to the lady absolutely whom he described as "my reputed wife."

On October 17, 1880, the plaintiff was born, and on April 2, 1881, acting under the advice of counsel, the parties went through a second form of marriage. Colonel Warter died on March 23, 1889, without making another will, and Mrs. Warter on November 8, 1889.

Deane, for the plaintiff, submitted that Mr. and Mrs. Tayloe were in the position of unmarried persons from the date of the final decree and subject to this disability, that they could not marry again in India until the expiration of six months; but, being English subjects, there was nothing in the law of England to prevent either of them marrying again in this country. [He relied on *Scott* v. *Attorney-General.* (1)]

S. H. Day, for the defendant. The decree absolute pronounced by the Indian Court does not take effect until six months after it is pronounced, and within that time it may be appealed against. But even if the decree does take effect from the date of being made absolute, as contended by the plaintiff, it is granted on the condition that neither party shall marry again

(1) 11 P. D. 128.

1890

WARTER v. WARTER.

within six months, and if that condition is violated the marriage is invalid. In *Scott* v. *Attorney-General* (1), the prohibition as to remarriage under the Dutch-Roman law, which prevailed in the colony where the decree was granted, applied to the guilty party only, and was therefore in the nature of a penalty. The innocent party was entitled to marry again at once; therefore the decree must have operated as a complete dissolution. *Ponsford* v. *Johnson* (2) is a similar case, where the guilty party was prohibited from marrying again until the innocent party was dead. But the Indian Divorce Act recites that neither party shall marry again within six months, and the restriction is not a penalty, but a condition the observance of which involves the validity of the second marriage.

Cur. adv. vult.

THE PRESIDENT. The plaintiff claims probate of a will dated February 6, 1880, made by her father, Henry De Grey Warter, who died on March 23, 1889. The defendant, the son of Henry De Grey Warter, alleges that the will, dated February 6, 1880, was revoked by the subsequent marriage of the testator with Annette Louisa Tayloe on April 2, 1881. The question in the cause is whether the marriage celebrated on April 2, 1881, was the marriage of the parties—that is, whether they had not concluded a valid marriage before the execution of the will—namely, on February 3, 1880. The material facts are as follows:—The mother of the plaintiff and defendant was formerly the wife of John Edward Tayloe, and was resident with him in India. In 1879 Henry De Grey Warter, the deceased in this cause, was a major in the Royal Artillery, stationed in India. In 1879 John Edward Tayloe, being so resident, instituted proceedings in the High Court of Judicature at Fort William in Bengal for the dissolution of his marriage on the ground of his wife's adultery with Major De Grey Warter, and a decree nisi was pronounced on May 19, 1879. This decree was made absolute on November 27, 1879. By the Indian Divorce Act of 1869, jurisdiction is given to dissolve the marriage when the petitioner professes the Christian religion and resides in India at the time of pre-

(1) 11 P. D. 128. (2) 2 Blatchford, 51.

senting the petition—that is, though he or or she may not be domiciled there. On the institution of the proceedings Mrs. Tayloe returned to England. Major De Grey Warter afterwards joined her in England, and went through a ceremony of marriage on February 3, 1880. At the time of the marriage Major De Grey Warter was domiciled in England. By the Indian Divorce Act—Act No. 4 of 1869—under which the proceedings were taken, it is enacted that "when six months after the date of any decree of the High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death." The marriage in question in this case took place within three months of the decree. It was contended that as this marriage was celebrated in England the parties were freed from the restraint imposed by the Indian Divorce Act. I am of opinion that that is not the case. Mrs. Tayloe was subject to the Indian law of divorce, and she could only contract a valid second marriage by shewing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage. The case of *Scott* v. *Attorney-General* (1) was relied on for the plaintiff. I there held that a colonial law prohibiting the marriage of the guilty party, so long as the other remained unmarried, did not operate as a bar to marriage where the guilty party had acquired a domicil in this country. The distinction between that case and the present is that there the incapacity to remarry imposed by the colonial law only attached to the guilty party. It was, therefore, penal in its character, and as such was inoperative out of the jurisdiction under which it was inflicted. A case to the same effect, and based on the same principle, was cited from an American report: *Ponsford* v. *Johnson*. (2) For these reasons

(1) 11 P. D. 128. (2) 2 Blatchford, 51.

1890

WARTER v. WARTER.

I am of opinion that the marriage of February 3, 1880, was invalid, and consequently that the will of February 6, 1880, was revoked by the valid marriage celebrated on April 2, 1881.

Solicitors for plaintiff: *Le Brasseur & Oakley.*
Solicitor for defendant: *E. F. Day.*

W. L.

June 10.

IN THE GOODS OF SLINN.

Probate—Will—Deed-poll—Intention—Extrinsic Evidence—Probate.

Probate granted of a deed-poll duly executed and attested by two witnesses, but containing no reference to the death of the testatrix, and extrinsic ev dence admitted to shew that she intended it to operate as a will.

APPLICATION for administration to the estate of Rhoda Slinn, deceased, with the following paper annexed as the last will and testament of the deceased:—

"To all people to whom these presents shall come, I, Rhoda Slinn, do send greeting. Know ye that the said Rhoda Slinn of No. 3 house, 3 Court, West John St., in the parish of Sheffield, in the West Riding of the county of York, widow, for and in consideration of the love, goodwill, and affection which I have and do bear towards my loving friend Elizabeth Walker, wife of Joseph Walker, of No. 5, Garden St., of the same parish and county, file-cutter, have given and granted, and by these presents do freely give and grant, unto the said Elizabeth Walker, her heirs, executors, or administrators, the moneys invested in my name in the Sheffield Savings Bank, Norfolk Street, in the parish of Sheffield, aforesaid, to have and to hold as her and their own without any manner of condition. In witness whereof I have hereunto put my hand and seal this 12th day of October, 1889.

"RHODA her X mark SLINN.

"Signed, sealed, and delivered in the presence of us *and in presence of each other.*

"GEORGE STUART, GEORGE MACKLEY."

From the affidavits filed in support of the motion, it appeared that Rhoda Slinn died November 3, 1889, and that about three

weeks before her death she divided her furniture between the applicant, Mrs. Walker, who was her niece, and Mrs. Walker's son, and that she went to live with Mr. and Mrs. Walker, who nursed her and took care of her until her death. A few days before the date of the will Mrs. Walker called to see the deceased, who had on several previous occasions expressed a wish that she should have the money in the Sheffield Savings Bank. The deceased said she felt very ill and would like to have a settlement of her affairs, as she did not think she would live long; she said that Mrs. Walker or her husband had better see to it. In reply to an inquiry whether she wanted to make a will, the deceased said she wanted to give Mrs. Walker the money in the savings bank in the cheapest way, and upon being informed that a will would cost one guinea, she said that some one had told her that a deed of gift was the same as a will and would not cost so much. A neighbour borrowed a book, and prepared the document, with which the deceased expressed her entire approval, and she then put her mark to it in the presence of the witnesses, who, in her presence and in that of each other, then put their names to it. Mrs. Walker understood that no benefit was to accrue to her until after the death of Rhoda Slinn. After the document had been executed, the deceased said: "There is Edwin Carrington; I should like him to have something." Mrs. Walker asked whether she had fixed the amount. The deceased said she had not mentioned it in the paper, but she would leave it to Mrs. Walker and the two witnesses to see that he got £10 after her death. Mrs. Walker promised that the payment should be made. The deceased sealed up the document in an envelope and gave it to Mrs. Walker to put in a certain tin box.

George Mackley, who drew the document from a form in a book which he borrowed for the purpose, added the words, "and in presence of each other," as he said that he looked upon the document more in the light of a will, and he thought those words were usually inserted in wills.

Notice of the present application had been given to the Queen's Proctor, and advertisements were inserted in the newspapers calling upon any next of kin of the deceased to come in and accept or refuse administration. No next of kin appeared, and the

1890

IN THE GOODS OF SLINN.

Queen's Proctor intimated that it was not his intention to take any steps in the matter. The sole property of the deceased consisted of her wearing apparel and the money in the savings bank, amounting to about £200.

Middleton, for the applicant Mrs. Walker, cited *Cock* v. *Cooke* (1); *Robertson* v. *Smith and Lawrence* (2); *In the Goods of Coles.* (3)

THE PRESIDENT. I am of opinion that this paper should be admitted to proof. It is clear that extrinsic evidence is admissible for the purpose of shewing with what intention an ambiguous paper has been executed. In addition to the improbability that a person would denude himself or herself of all property during his or her life, there is in this case, as in one or more of the cases which have been referred to, evidence of expressions wholly inconsistent with the idea that it was a gift out and out. In the case of *Robertson* v. *Smith and Lawrence* (2) an expression was used by the deceased very similar to one in the present case, in which the deceased, referring to Edwin Carrington, said she would like him to have something, if there was enough for it after her decease. It is plain that this document is testamentary, and I, therefore, admit it to probate, and grant the applicant administration with the said document annexed.

Solicitors: *Geare, Son, & Pease.*

(1) Law Rep. 1 P. & D. 241. (2) Law Rep. 2 P. & D. 43.
(3) Law Rep. 2 P. & D. 362.

W. L.

LODGE *v.* LODGE.

1890
May 23.

Divorce—Husband's Adultery coupled with Desertion—Husband willing to return to Cohabitation—Decree of Judicial Separation.

In a wife's suit for dissolution on the ground of adultery coupled with desertion the adultery was proved; and with regard to the desertion, it appeared that after twenty-one years' cohabitation it was, in August, 1886, agreed between the parties, who were then resident abroad, that the wife and the children of the marriage should come to live in England. They accordingly took lodgings at Bournemouth, and the wife pressed her husband to return with them, but he refused. She continued willing to receive him and renew cohabitation until February, 1887, when she was shewn a letter which convinced her that her husband had been carrying on an adulterous intercourse. Upon this she resolved that she never would live with him again. He wrote several letters to her offering to return to cohabitation, to which she did not reply; but her solicitors, by her direction, informed him that she would never live with him again:—

Held, that there being no proof that the husband's offers to live again with his wife were not bonâ fide, she could not treat the separation on which she insisted as desertion by him, and that she was only entitled, therefore, to a judicial separation on the ground of adultery.

THIS was a petition by the wife praying for a dissolution of the marriage on the ground of the husband's adultery coupled with desertion. The respondent in his answer denied the adultery and the desertion, and pleaded that the petitioner had connived at his adultery, if any, and had condoned it. The only question in the case was, however, whether there had been desertion without reasonable cause for two years and upwards.

At the hearing before Butt, J., sitting without a jury, it appeared that the parties were married in December, 1865, and had cohabited at various places until August, 1886. There were five children of the marriage; and the petitioner had an independent income of her own, amounting to about 500*l.* a year. In August, 1886, the parties being then at Bruges, where they had resided for some years, it was arranged that the petitioner and her children should go to reside at Bournemouth, where they took lodgings. The petitioner stated that she pressed the respondent to come to Bournemouth with her and her children, but that he refused for financial and other reasons which he alleged. At their parting he kept 45*l.* out of 50*l.*, which she had received from the trustees

1890

LODGE v. LODGE.

of her marriage settlement, and in October, 1886, she sent him 20*l*. Up to February, 1887, she was willing and desirous to resume cohabitation; but on February 26 her eldest daughter shewed her a copy of a letter which she had found some years before in a book lent to her by the respondent. It was from the lady with whom the respondent was charged with having committed adultery, and, on seeing it, the petitioner determined never to live with the respondent again. He wrote to her several letters asking for money, and begging to be allowed to join her at Bournemouth. She did not reply to them, but forwarded them to her solicitors, who informed him that by their advice the petitioner would neither send him any more money nor live with him again. The adultery, which was not contested at the hearing, was alleged to have commenced in 1881, and to have been continued until a very recent date.

Inderwick, for the petitioner, contended that the desertion commenced in August, 1886, and had been continued ever since, notwithstanding the petitioner's refusal to take her husband back. [He cited *Farmer* v. *Farmer* (1), and *Garcia* v. *Garcia*. (2)]

Deane, for the respondent.

BUTT, J. In this case the husband has behaved badly, and one would be glad to give the wife the relief she asks for. But the marriage cannot be dissolved unless there has been desertion for two years and upwards. Desertion undoubtedly commenced in August, 1886, when the husband on one excuse or another refused to accompany his wife to Bournemouth; but the question is whether that desertion has been continued for two years and upwards. No doubt an adulterous intimacy existed between the respondent and the lady who has been mentioned previous to 1887, and was continued with little interruption down to the autumn of last year. The letter shewn to the petitioner in February, 1887, satisfied her that adulterous relations existed, and if she had then instituted a suit for judicial separation she must have obtained a decree. That being so, she was within

(1) 9 P. D. 245. (2) 13 P. D. 216.

her right to decline to resume cohabitation with the respondent; but there remains the question, can she insist on a separation from her husband and at the same time use the separation which she insists on as a desertion by her husband? I think not. More than one offer was made by the husband to return to cohabitation; but the wife's reply to those offers was to direct her solicitors to inform her husband that she had made up her mind not to live with him. In the witness-box she stated that to have been, and to be, her determination. If it appeared that the husband's offer to return to cohabitation was not bonâ fide, it would not bar the wife's remedy. But the onus of shewing that lies with the petitioner, and I am of opinion that it has not been shewn in this case. Under these circumstances, I can only grant the petitioner a decree of judicial separation on the ground of her husband's adultery.

Solicitors for petitioner: *Lyne & Holman.*
Solicitors for respondent: *Loughborough & Gedge.*

W. L.

BUTLER *v.* BUTLER.
BUTLER *v.* BUTLER AND BURNHAM (THE QUEEN'S PROCTOR INTERVENING).

June 27.

Divorce—Cross Suits—Decree Nisi granted to the Wife—Queen's Proctor's Intervention—Both Parties guilty of Collusion—Decree rescinded—Money paid into Court for the Wife's Costs ordered to be paid out to Queen's Proctor.

At the trial of two cross petitions for dissolution by the husband and wife, the wife, by arrangement between the parties, obtained a decree nisi, and the husband was condemned in costs. The Queen's Proctor intervened, charging both parties with collusion, and the wife with adultery. At the trial of these issues the jury found that the parties had been guilty of collusion, but disagreed as to the adultery, and the decree nisi was rescinded. The husband had paid into Court sums amounting to 140*l.* to meet the wife's costs. The Court had refused—and the Court of Appeal had confirmed this decision—to allow any part of the sum to be paid out to the wife or her solicitors.

The Court now, on application by the Queen's Proctor, ordered the whole sum of 140*l.* to be paid out to him in part payment of his costs for procuring the reversal of the decree nisi.

APPLICATION for moneys paid into Court to be paid out to meet the Queen's Proctor's costs.

1890

BUTLER v. BUTLER. BUTLER v. BUTLER AND BURNHAM.

In this case there had been two trials. The first was of cross petitions by the husband and wife, each praying for a dissolution, and by arrangement between the parties it ended in a decree nisi being granted at the instance of the wife, the husband being condemned in costs. The Queen's Proctor then intervened, and charged both parties with collusion and suppression of material facts, and he added several charges of adultery against the wife. The jury on the second trial found that both parties had been guilty of collusion, but they were unable to agree on the charges of adultery against the wife.

Butt, J., thereupon rescinded the decree nisi, and the Court of Appeal confirmed this decision.

In the course of the proceedings the husband had paid into Court, on the order of the registrar, various sums amounting to 140*l.* to meet the wife's costs; and on February 4 an application was made on behalf of the wife that she should have paid out to her the whole or part of these sums. Butt, J., refused to make any order, and this refusal was also confirmed by the Court above on the wife's appeal.

Jacques, for the Queen's Proctor, applied for an order that the 140*l.* be paid to him in part payment of his costs in obtaining the rescission of the decree nisi. Butt, J., has decided that the wife is not entitled to have the money applied to the payment of her costs.

Stevenson, for the wife. The fund which was called into existence for the purpose of defraying the wife's costs ought not to be paid out, and there is no precedent for money paid into Court for one purpose being applied to another. The Queen's Proctor failed to establish the charges of adultery which he made against the wife, and has declined to go to a second trial; consequently, the wife is entitled to the costs of defending herself against them.

[THE PRESIDENT. Any application on that ground should be made to Butt, J.]

The Court has full power to make any order in regard to the wife's costs which it thinks just.

THE PRESIDENT. I am of opinion that I ought to order, and I do order, that this sum of 140*l.* be paid out to the Queen's

Proctor. It was a sum paid in to meet the wife's costs in a suit which has been substantially disposed of. The Queen's Proctor intervened, and has succeeded in establishing that the wife was not entitled to the decree which she had obtained, because she had been party to a collusive arrangement with her husband. The Queen's Proctor also added some charges of adultery against her as to which the jury did not agree; but the Queen's Proctor, having succeeded in proving issues sufficient for the purpose of shewing that the wife was not entitled to a decree, does not think it necessary to go on with these charges. The wife, after the trial of the intervention, applied to the judge who tried the case that she might have her costs out of the money paid into Court by the husband. The question was one exclusively within the discretion of the judge who tried the case, and he, upon consideration of all the facts, has refused the application. That must be taken as absolutely concluding a matter with which I have nothing to do. In saying that an application should be made to him, I did not mean to encourage any such application. I have no doubt that if there had been any prospect of obtaining such an order, an application would have been made to him. I only meant that I have nothing to do with the matter; but I must take the order of Butt, J., which has been upheld by the Court of Appeal, to be absolutely conclusive of the fact that the wife has no right to have her costs. It follows from this that she has no claim on this fund, and her claim being unfounded and futile, it remains a fund belonging to the husband, which could be dealt with as any other fund of his could be—by order of the Court, by attachment, or otherwise. That, however, is only a matter of form, and I have power, all parties being before me as they are, to direct that this money, which primâ facie belongs to the husband, should be paid to the Queen's Proctor, who has obtained a decree for costs against him. I accordingly order that the sum of 140*l.* be paid out to the Queen's Proctor.

Solicitor: *The Queen's Proctor.*

Solicitors for the wife: *Clinton & Buckley.*

W. L.

1890
July 22.

[IN THE COURT OF APPEAL.]

THE RUBY.

Admiralty—Collision—Compulsory Pilotage—River Burry—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 353—6 & 7 *Vict. c. lxxxviii.*

Pilotage in the case of vessels trading to or from the port of Llanelly is compulsory.

APPEAL from a judgment of Butt, J. (1)

The facts, statutes, and bye-laws are set out in the previous report.

Barnes, Q.C. (*Raikes*, with him), for the plaintiffs, in addition to the points relied on in the Court below, argued, that if the master was bound to take a pilot on board the latter was only an adviser, the navigation of the ship remaining solely with the master.

[He cited *The Guy Mannering.* (2)]

Sir W. Phillimore, and *Aspinall*, for the defendants, were not called on.

LORD ESHER, M.R. The question in this case is, whether this vessel was bound to take a pilot on board, and whether the captain, when the pilot was on board, had to give up the navigation of the vessel to him—in other words, was pilotage compulsory? Such an obligation is put on a vessel, not for the benefit of individual shipowners, but for the protection of the general body of shipowners, on account of the difficult navigation of most of our ports. The persons who made these bye-laws had not to think of the results which might ensue in consequence of pilotage being compulsory if ships came into collision, for these are a consequence of the principles of the common law. The bye-laws in question have the force of statutes. Llanelly is a small port, and the legislature gave to local persons power to make bye-laws, which would have the same effect as statutes have in regard to larger ports. The preamble of the first local Act relating to this port, viz., that

(1) Ante, p. 139. (2) 7 P. D. 132.

of 1813, shews the intention of the legislature; it was that pilotage should be regulated and the entry to the port made safer. Sect. 158 of the Act of 1843 gives power to make bye-laws for regulating the navigation of the port. In order to regulate there must be ample power of control, and one of the first things required for the proper navigation of the port is that vessels should be steered in and out safely. A pilot acquainted with the locality would do this best. Therefore the authorities would have power to select and license pilots. There are decisions which shew also that where authorities have power to make bye-laws they have also power to impose reasonable penalties to enforce them. I am clearly of opinion that the authorities of this port have power to order a pilot to be taken on board vessels navigating into or out of it, and the fact that they have made bye-laws since 1814 regulating pilotage, and that these have never been disputed, is strong to shew the interpretation of them generally accepted. As to the other point, it is ridiculous to say that if a pilot must be taken on board he is not to have charge of the navigation of the ship. I have no doubt that pilotage was compulsory on this ship, and that the appeal must be dismissed with costs.

LINDLEY, L.J. The question in this case is, what is the true construction of s. 158 of the Act of 1843? To discover it we must look to the earlier Acts, and especially to the preamble of the Act of 1813. When these are read, it becomes obvious that the legislature has given power to make pilotage compulsory in this port.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

1890
May 15

THE STAKESBY.

Collision—Lights—Regulations for Preventing Collisions at Sea—Article 11.

By article 11 of the Regulations for Preventing Collisions at Sea, "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light." The plaintiffs' barque was proceeding in tow of a tug in the North Sea, about eleven miles off Whitby, and, in addition to the regulation side lights, had a light fixed to her stern. While so proceeding, she was struck by an overtaking vessel:—

Held, by Sir James Hannen, that, having regard to the circumstances at the time of the collision, the barque had not infringed article 11 by carrying a fixed stern light.

The Imbro (14 P. D. 73) considered.

ACTION for damage by collision. The plaintiffs were the owners of the barque *Dilbhur*, and the defendants were the owners of the steamship *Stakesby*. The collision between these vessels happened between 9 and 10 P.M. on March 2, 1890, in the North Sea, about eleven miles off Whitby. The *Dilbhur* was at the time in tow of a tug, and, in addition to her regulation side lights, carried a fixed light at the stern, for the purpose of warning overtaking vessels. The weather at the time was fine and clear. The *Stakesby* was first seen about two miles off on the port quarter of the *Dilbhur*, and eventually came into collision with her by striking her in the port fore-rigging with the starboard bow. As the case is reported on the question of the legality of carrying a fixed stern light, the other facts are not material, except such as are stated in the judgment of the Court.

Barnes, Q.C., and *Raikes*, for the plaintiffs.

Sir W. Phillimore and *Aspinall*, for the defendants.

On the question of the stern light, the cases of *The Imbro* (1) and *The Palinurus* (2) were referred to.

THE PRESIDENT. [The learned judge having found that the stern light of the *Dilbhur* was exhibited and burning brightly, as alleged by the plaintiffs, and that the collision was caused by the bad look-out on the *Stakesby*, proceeded as follows:—] A

(1) 14 P. D. 73. (2) 13 P. D. 14.

question has been raised whether there has been an infringement of article 11 of the Regulations for Preventing Collisions at Sea on the part of the *Dilbhur*. I observe that Butt, J., in his judgment in *The Imbro*, (1) refers to my decision in *The Palinurus* (2); but, from my recollection of that case, I do not think I had this point present to my mind, and I do not think I have given any decision upon it. Two things occur to me: first, that it cannot be that the mere fixing of the light is an infringement of the rule, because that would lead to this result—that the rule could only be complied with by a waving of the light; but there is nothing in it pointing to anything of that sort. The question one has to consider is whether or not, in the state of navigation in the place where the collision occurred, it was proper that there should be a permanent light exhibited to overtaking vessels. It appears that there were a number of vessels about, and I am advised by the Trinity Masters that it was not improper to have a permanent stern light on this vessel, to be a guide to the vessels which were passing. It has also to be remembered that several vessels had previously passed, which would also need the assistance of a stern light. This opinion is in accord with my views. I am, therefore, of opinion that there has not been an infringement of article 11. I should be inclined to construe this article thus: that the flashing of a light, which is a thing done on a sudden, is sufficient; but not, therefore, that a fixed light is an infringement of the article. The circumstances here justified something more than the mere flashing of a light. I should also add that there was such a bad look-out on the *Stakesby*, that it was not the difference between a flashing and a fixed light which conduced to the collision. If there had been a good look-out on the *Stakesby*, the stern light and the tug's light would have been seen sooner than they were. I therefore pronounce the *Stakesby* alone to blame.

Solicitors for plaintiffs: *Farlow & Jackson.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

(1) 14 P. D. 73. (2) 13 P. D. 14.

1890
July 5.

[IN THE COURT OF ARCHES.]

IN RE SARGENT.

Ecclesiastical Law—Faculty for Burial—Reserved Grave Space—Order in Council closing Churchyard except to Members of Families of Parishioners—Petition by Non-Parishioner Member of such a Family.

By an Order in Council a churchyard was closed except as to burials in reserved grave spaces allotted to members of the families of parishioners:—

Held (reversing the decree of the Consistory Court of Chichester), that a faculty for the reservation of a space in the churchyard for exclusive burial could be granted to a living non-parishioner, member of the family of a parishioner.

APPEAL from a decision of the Chancellor of the Consistorial Court of Chichester, refusing William Sargent, of No. 3, Walton Place, Chelsea, in the county of Middlesex, a faculty to have a piece of ground in the churchyard of the parish of Woollavington, in the county of Sussex, appropriated to him as a burying-place for himself, exclusive of all others.

By an Order in Council, dated May 19, 1885, and made under the provisions of 16 & 17 Vict. c. 134, burials in the churchyard of Woollavington were to be discontinued, except as follows:—

"In such reserved grave spaces in the churchyard as have never before been buried in, burials may be allowed of such members of the families of parishioners to whom they may be allotted as can be buried at or below the depth of five feet . . ."

The petitioner was the grandson of John Sargent, M.P., a parishioner. The petitioner's father and other members of the family were buried in the churchyard, and the blank space next to the grave of his mother was that in respect of which he applied for the faculty.

Jeune, Q.C. (*H. C. Richards,* with him), for the petitioner. The chancellor considered that he had no power to grant the faculty, because the churchyard was closed; and because the petitioner, being a living non-parishioner, did not come within the exception. But there is power to grant a faculty to a non-parishioner, as the word "family" used in the reservation is equivalent to

descendants: *Rugg* v. *Kingsmill* (1), where the words (at page 60) of the grant were to Kingsmill . . . his family and successors . . ." The form at page 431 of the Clerk's Instructor (1740) is, "their heirs and families for ever." So in Oughton, Ordo Judiciorum (1738), vol. ii., page 297, No. 322, the form is, "Mrs. Mary Bramston, her heirs and family"; and in *Nevill* v. *Baker* (2), Dr. Lushington's decision is with reference to performing divine service over the body of a member of a family who had ceased to be a parishioner.

It is not illegal for a non-parishioner to be buried in a churchyard: see *Littlewood* v. *Williams* (3) and Gibson's Codex (1761), vol. i., p. 458, setting out the Act 7 & 8 Wm. 3, c. 35, s. 7, requiring incumbents, for the purposes of taxation, to give notice of the burial of strangers. After death the burial of a non-parishioner can take place with the consent of the vicar: see the opinion of Dr. Harris, quoted at 1 Phill. 844; and a faculty may be obtained for a monument to a non-parishioner: *Bardin* v. *Calcott.* (4) So also a faculty may be obtained for removing a body from one churchyard to another: Oughton, No. 330, and the Clerk's Instructor, p. 427. There is no principle upon which the faculty can be refused because the petitioner is living, and in the diocese of London it is not an uncommon practice to grant such a faculty: see, for example, a petition presented to the chancellor of the diocese of London by Thomas Duley, of 8, High Street, Uxbridge, for a licence or faculty to be buried in the grave of his parents in the churchyard of the parish of Bedfont, of which parish his parents were parishioners. The faculty, granted April 26, 1887, reserved the said grave to Thomas Duley as a burial-place for himself, exclusive of all others.

[The appeal was unopposed, no appearance to the citation having been entered on behalf of the chancellor, rector (there were no churchwardens), or parishioners.]

LORD PENZANCE. The difficulty as to the petitioner being a living non-parishioner is removed by the precedent produced from the diocese of London, shewing that a faculty of this kind

(1) Law Rep. 2 P. C. 59.
(2) Quoted in 1 Phill. 845.
(3) 6 Taunt. 277.
(4) 1 Hagg. Consist. Rep. 14 (17).

1890

IN RE SARGENT.

Lord Penzance.

would not be an exception to the general practice. The other difficulty, that of bringing the petitioner within the words of the reservation in the Order in Council, is cleared away by the cases cited, which shew that a non-parishioner will be included in "members of the families of parishioners." The appeal will, therefore, be allowed; but the restriction as to the burial being at or below the depth of five feet will be inserted, in accordance with the provisions of the Order in Council.

Faculty granted.

Solicitors for appellant: *Keen, Rogers & Co.*

E. S. R.

Jan. 24, 25, 27; *March* 11.

[IN THE COURT OF APPEAL.]

HARRIS *v.* KNIGHT.

Probate—Lost Will—Contents proved by Oral Evidence.

W. K. died in 1877. At his funeral his widow produced a document, which she stated to be the will of W. K. It gave her a life interest in his property, which consisted of a freehold house and land, and divided it after her death among the sons and daughters of the testator. The document was subscribed with three names, one of which purported to be the name of W. K., written in his own handwriting; the other two names were those of friends of the testator. At the funeral the defendant, who was the eldest son of W. K., said that the document was no will of his father's, and that the signature was not in his writing. But he took no steps to assert his right as heir-at-law, and the widow continued to occupy the house and land until she died in July, 1885, without, however, taking any step to prove or establish the will she had so produced. After her death the will could not be found; and the plaintiff, who was one of the daughters of the marriage, propounded the alleged will, and pleaded that although it was lost the Court ought to grant probate of it. Both the persons whose names were subscribed to the lost document were dead. No copy or draft of such document could be found, and it was not proved that it bore any date or contained any attestation clause; but its existence and contents, and the handwriting of the testator, and that of one of the two friends of his who had subscribed it, were proved to the satisfaction of Butt, J., who granted probate of the will.

On appeal, *held*, by Lindley and Lopes, L.JJ., Cotton, L.J., dissenting, that Butt, J., was justified in presuming that the lost will was duly executed, and in granting probate accordingly.

APPEAL from Butt, J.

The plaintiff, Emma Jane Harris, propounded a non-existent paper, which purported to be the last will and testament of her

father, William Knight, who died in 1877; and the defendant, the eldest son and heir-at-law of the deceased, opposed probate, alleging that the will was not duly executed, that the testator did not know and approve of the contents, and that the contents of the will were not correctly set forth in the plaintiff's statement of claim.

William Knight was a gardener, living at Caversham in Oxfordshire, and his estate consisted of a double house, with land attached to it, which it was stated had been purchased with the money of his wife, who managed his business. At Wm. Knight's funeral his widow produced a written paper, which she stated was her husband's will. It gave a life interest to her in the freehold, which was directed to be divided after her death among the sons and daughters of the testator. The paper was subscribed with three names, one of which purported to be the name of Wm. Knight, the deceased, written in his own handwriting; but the defendant, who read the paper at the funeral, said at once it was no will of his father, and that the signature stated to be his was not in his handwriting. The executrix, the widow, took no steps to obtain probate of the document, and the defendant, on the other hand, took no steps to assert his rights as heir-at-law, but allowed his mother to live on the freehold undisturbed down to July 17, 1885, when she died. She drew up two wills, but neither of them was completely executed. In 1886 the plaintiff took out letters of administration to the estate of his father as having died intestate; and the defendant, his sister, the wife of James Harris, now propounded the contents of the paper read at the funeral of Mr. Knight, which was alleged to be his last will and testament. The paper itself was not forthcoming, and there was no evidence as to its execution, nor as to when it was executed, and it was not shewn that it contained an attestation clause. There was, however, evidence to shew that the body of the paper was in the form of a will, and that it was followed by three signatures, one of which purported to be that of Wm. Knight. Both the attesting witnesses were dead, but there was evidence to identify the signature of one of them. As to the signature of the testator, there was a direct conflict of testimony. Witnesses called for the plaintiff stated that Wm.

1890

HARRIS v. KNIGHT.

Knight told them he had made a will containing provisions similar to those read out at the funeral from the will—while witnesses for the defendant stated that, shortly before his death, Wm. Knight told them that he had made no will. The plaintiff accounted for the disappearance of the paper by evidence that in July, 1885, when Mrs. Knight, the widow of the testator, was on her death-bed the paper was in her possession when the defendant called to see his mother, and that it was never seen again after his visit. The account given by the defendant of what passed at his interview with his mother was that, when he went into the room where his mother lay ill, she ordered her daughter and another woman who was there out of the room. When they had gone she told him to take a paper out of the pocket of her dress. He searched the pocket, but could find no paper, whereupon his sister was called up, and she explained that the paper having fallen out of her mother's pocket she had placed it on the bed, and it was found between the mattress, and in the bed. The daughter was then sent out of the room again, and Mrs. Knight thereupon tore up the paper, put the pieces in her pocket, saying that it did not concern any of her children. The paper he said was quite different from that read at the funeral. The plaintiff in her evidence denied that any fragments were found in the pocket of her mother's dress after the defendant's visit. The other facts will be found in the judgment.

The case was heard before Butt, J., without a jury.

C. A. Middleton, for the plaintiff.

A. Statham, for the defendant.

BUTT, J. There are certain facts in this case which are established beyond all controversy. In the first place, it is clear that a document in the shape of a will, bearing the name of the testator, the name of one Earles, and the name of Caleb Heningham, existed at the time of the testator's death, and had been in existence two years before his death: that it was placed on his coffin at his funeral, and that it was handed to defendant by the widow, and read by him. Another matter not in dispute is, that the contents of the document, whether a valid will or not, were practically those set forth in the plaintiff's statement of claim.

The part as to the executorship is not admitted; but the part as to the disposition of the property is admitted. The real question in the case has been this, was that document so read at the funeral really signed by the testator and attested by the two witnesses—in other words, was it duly executed? Now, in the first place, the son-in-law, James Harris, who was present at the funeral and who heard it read, speaks with perfect confidence as to the fact that the name which undoubtedly appeared at the end of the document was the testator's handwriting; and he has sworn also with equal distinctness, to the name of Earles, one of the attesting witnesses. The disposition which the will makes of the property was a reasonable disposition, and there is abundant evidence that it was the disposition which the testator desired. Now, the testator having died in 1877, the defendant, being heir-at-law, and having, as he said, made up his mind that the will was not a valid document, and that the signature was not his father's, and that therefore it was no will—takes no steps to assert his rights until 1885, when his mother died. That certainly raises a presumption, I will not say an irrefutable presumption, but one not lightly to be excluded from one's purview of the case, against his present contention. That document has disappeared, and there has been a grave contention as to how it came to disappear. It has been suggested that it got into the hands of the defendant and that he made away with it. But though there are circumstances raising grave suspicion, I do not think it at all necessary to decide that he made away with it. I prefer to believe on the whole, that it was the widow who destroyed it. I do not mean wickedly or with any intention of doing a wrong to her children—but under the impression that, though it left the greater part of the house to her five daughters, it left them no land by which they could get into that house, and it would, therefore, be nugatory. She thought, that as she had the property she would do what was right by making a will. In the legal aspect of the case it matters not if the document was properly executed and if it was in existence at the time of and after the death of the testator, who destroyed it, or what has become of it. No less than five persons called on behalf of the plaintiff, most of whom appear to have given evidence very fairly

1890

HARRIS v. KNIGHT.

Butt, J.

and to be thoroughly respectable, have sworn that the testator told them at different times that he had made a will. Three witnesses on the other side, stated that he told them that he had not made a will. I do not accept that evidence. I have no doubt that this testator not only said that he had made a will, but said he had made it distributing the property in the way the plaintiff's witnesses have described, and in the way the defendant admits the document in question disposed of the property. Now it is very true there is no actual proof of the execution of the will, but there was a document produced at the funeral which bore the name or the signature of the deceased testator, and one respectable witness, at least, has sworn, that he has no doubt it was his signature, and it bore the names of two witnesses now dead, one of whose handwriting is proved. What is the presumption? It could not have been a mere draft of the will, because people do not get two witnesses to sign a draft. There was no attestation clause, but if I come to the conclusion that that man really signed the will, and that these two people were called in to witness it, and did put their signatures, then the document is valid and effective as a will. I have no doubt on the subject. I have no doubt that the will bore the man's signature, and that it was attested by Earles and Heningham.

In that state of things the maxim, "Omnia præsumuntur rite esse acta," applies, and therefore I find that the document was a will validly executed. There being no dispute between the parties as to its contents except with regard to executorship, I pronounce for the contents as set forth in the plaintiff's statement of claim which contains the appointment of the testator's executor. I have not the slightest doubt in my own mind on the balance of the testimony that the executorship alleged to have been made was made by the will. I revoke the letters of administration and grant probate of the will.

No order as to costs.

W. L.

The defendant appealed.

Dr. Tristram, Q.C., and *Statham*, for the defendant. The defendant contends that the verdict is against the weight of evidence, or that, taking the various facts, and having regard to the

Wills Act, no case has been made out for a grant of probate. There is no proper proof of the execution of the will, and there is no sufficient proof that the deceased knew and approved of the contents of the will. As a general rule, due execution of a lost will cannot be established by secondary evidence; but at all events the evidence here is not sufficient. In all the cases in which a lost will has been admitted to probate there has been produced either a draft will, or an entry in the books of the solicitor, or evidence of the receipt of instructions for the will, or corroborative evidence of some kind. Here there is no ocular evidence of the will, and not a scrap of paper can be produced in support of it. There is no date to the alleged will, there is no attestation clause. Both the alleged witnesses are alleged to be dead; but there is no proper evidence of the death of one of them, and there is no sufficient proof of the handwriting of these alleged witnesses. The handwriting of only one of the attesting witnesses is proved, and that only by one witness, who is also the only witness who swears to the signature of the testator, and who is, moreover, the husband of the plaintiff and an interested party, who has received money upon the strength of this alleged will. Proof of a lost will by one witness is not enough, and à fortiori when there is no attestation clause.

[They cited *Podmore* v. *Whatton* (1); *Andrew* v. *Motley* (2); *Brown* v. *Brown* (3); *Belbin* v. *Skeats* (4); *Doe* d. *Davies* v. *Davies* (5); *Doe* d. *Harborne* v. *Lewis* (6); *Huble* v. *Clark* (7); *Charlton* v. *Hindmarsh* (8); *Wharram* v. *Wharram* (9); *Cutto* v. *Gilbert* (10); *In the Goods of Brown* (11); *Sly* v. *Sly & Dredge* (12); *Quick* v. *Quick* (13); *In the Goods of Barber* (14); *In the Goods of Callan.* (15)]

In *Woodward* v. *Goulstone* (16) there was evidence of the factum of the will, and the difficulty was as to the contents. Here the

(1) 3 Sw. & Tr. 449.
(2) 12 C. B. (N.S.) 514, at p. 532.
(3) 8 Ell. & Bl. 876.
(4) 1 Sw. & Tr. 148.
(5) 9 Q. B. 648.
(6) 7 Car. & P. 574.
(7) 1 Hagg. Ecc. R. 115.
(8) 8 H. L. C. 160.
(9) 3 Sw. & Tr. 303.
(10) 9 Moo. P. C. 131.
(11) 1 Sw. & Tr. 32.
(12) 2 P. D. 91.
(13) 3 Sw. & Tr. 442.
(14) Law Rep. 1 P. & D. 267.
(15) 9 Ir. Rep. Eq. 484.
(16) 11 App. Cas. 469, 471.

1890

HARRIS v. KNIGHT.

factum of the will is in dispute; and there is no case in which so many elements adverse to the will concur.

Middleton, and *J. C. Priestley*, for the respondent, the plaintiff. There are three issues: first, as to the execution of the will propounded; secondly, as to the testator's knowledge of its contents; and thirdly, as to what those contents were. The first issue, namely, whether the signatures to the will are genuine is the only material one. The rules to be applied where, as in the present case, a will has no memorandum of attestation, are laid down in *Burgoyne* v. *Showler*. (1) That case shews that the Court will presume, primâ facie, that the testator and the subscribing witnesses all signed in the presence of each other, so as to satisfy the requirements of s. 9 of the Wills Act, 1 Vict. c. 26. It may be admitted that there is no actual evidence here that all three persons were present at the same time; but the three signatures were genuine. It is true that there is no evidence as to how, when, or where they were affixed, except that they must have been affixed before 1875, when one of the witnesses died.

[LOPES, L.J., referred to *In the Goods of Barber*. (2)]

It is submitted that, upon the evidence, the weight of testimony is in favour of the will. Had it been a fraud on the part of the testator's widow she would have given herself an absolute interest instead of merely a life interest.

Where there is no attestation clause, it is enough if the signatures are identified, and the maxim, "Omnia præsumuntur rite esse acta," applies. Here the signature of one witness is shewn to be genuine, and Butt, J., has inferred that the other signature was genuine also. The identification of the other signature would have brought the plaintiff no nearer to strict proof of both witnesses being present at the same time; but from the presence of their names it is a reasonable inference that they were. According to Jarman on Wills, 4th ed., p. 85, "When the death of the witnesses prevents the obtaining of actual proof, a compliance with the statutory requisition in all its parts would it seems, even in the absence of express statement, generally be presumed."

[They cited *In the Goods of Thomas* (3); *Trott* v. *Skidmore*. (4)]

(1) 1 Rob. 5.
(2) Law Rep. 1 P. & D. 267.
(3) 1 Sw. & Tr. 255.
(4) 2 Sw. & Tr. 12.

[COTTON, L.J. In *In the Goods of Thomas* (1) there was something to lead to the presumption that the two witnesses were present at the same time.

LOPES, L.J.:—Is there any case where the signature of the attesting witness has been assumed to be his without any evidence?]

No such case can be found, but the learned judge was entitled so to find upon the whole of the facts before him. Given the signatures of the testator, and given the signatures of two other persons as witnesses, the presumption is that the requirements of the statute have been complied with.

[They also referred to *In the Goods of Jordan* (2), *Tatham* v. *Hayes* (3), and Stephens' Digest of the Law of Evidence, p. 74.]

Dr. Tristram, Q.C., in reply, referred to Roscoe on Evidence, p. 130, and 2 Taylor on Evidence (8th ed.), p. 854.

Cur. adv. vult.

March 11. COTTON, L.J. The question we have to consider is, whether probate has been properly granted of what is said to be the will of William Knight. William Knight died in 1877. He had a small landed property consisting of one of the eyots at Caversham. His heir-at-law disputed the will, and brought this appeal. At the time of the funeral he said he should question the will, and he now questions it on the ground that it was not duly executed. It is true he left his mother in possession of the property, but then it must be remembered that she was not only a managing woman but had a good deal of influence over her son. The document had the names of two persons written on it, besides that of William Knight. One of those persons died in 1875, but the other was alive for many years afterwards; and the principal witness in favour of the will admitted that during the whole of his lifetime he made no inquiry as to the execution of the will. But to my mind what tells most strongly against those who rely on the document is, that during the lifetime of the widow they took no step and made no inquiry, although she must have known all about the facts. The burden of proof is

(1) 1 Sw. & Tr. 255. (2) Law Rep. 1 P. & D. 555.
(3) 1885, unreported.

1890

HARRIS v. KNIGHT.

Cotton, L.J.

thrown on those who wish to propound the instrument. On the death of the widow the will could not be found. On the evidence, it had been destroyed somehow or other. I think, though this is doubtful, that it had been destroyed by the widow with the knowledge of the heir. [The Lord Justice then referred further to the evidence, and continued:—] I think, however, that as Butt, J., had all the witnesses before him, we should not be justified in questioning his decision as to the existence of a document signed by William Knight, and bearing the signatures of two other persons, one of which signatures was certainly genuine. But that is not all. The law requires certain formalities as to attestation. By the 9th section of the Wills Act (1 Vict. c. 26), it is enacted "that no will shall be valid unless it shall be in writing and . . . signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Now it is an important fact that in this document there is no attestation clause in the usual form. The question whether the legal formalities have been performed is a question of fact; and I do not intend to refer to the cases in which the judges have held (sometimes, I think, not with good reason) that the formalities required by the Act have been performed, because, to my mind, it is no use to refer to those cases unless they establish some rule which must be obeyed. In my opinion, this Court is at liberty to, and must, exercise its judgment on this point. There is no proof as to these formalities apart from presumption. If there had been an attestation clause, there being the handwriting of two persons as witnesses, which I will assume to be genuine, I should consider that the formalities had been complied with, for I should think that no one would have signed his name to the statement contained in such clause unless it were true. I consider from the contents of the will that it bears internal evidence that it was prepared by someone who did not know what the law was, and the presumption in my opinion is

that the legal formalities for a valid will have not been complied with. However it may seem to be against the wishes of the deceased, who has signed this document which he has said was his will, it is the duty of the Court to decide according to the law. The legislature has—in my opinion very wisely—imposed these formalities to prevent documents from being propounded as wills which are not wills, and we are bound to follow the law. I think, therefore, that the decision of the Court below was a wrong and dangerous decision, which will probably open the door to having documents produced and propounded as wills which were not executed with the formalities which the law requires.

LINDLEY, L.J. A person who propounds for probate an alleged will, and who is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on those points.

If he can do this, he is entitled to probate, as is shewn by the case of *Sugden* v. *Lord St. Leonards.* (1) But it is obvious that any laxity or want of vigilance on the part of the Court in a case of this kind would encourage the fabrication of wills, and lead to perjury, which it would be extremely difficult to detect.

The questions before us are these: Did Knight make and sign a will? Was it properly executed and attested? Are its contents proved? All these are questions of fact; and the first being settled, and the third being admitted, the case really turns on the question, whether the will was duly executed and attested. The maxim, "Omnia præsumuntur rite esse acta," is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The

(1) 1 P. D. 154.

1890

HARRIS v. KNIGHT.

Lindley, L.J.

maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect. Upon this I may refer to the cases of *Trott* v. *Skidmore* (1), decided in 1860; *Wright* v. *Rogers* (2), decided in 1869; *In the Goods of Jane Thomas* (3), decided in 1859; and *Burgoyne* v. *Showler* (4), decided in 1844. In *Trott* v. *Skidmore* (1) there was no attestation clause, but at the end of the will there was the name of the testator, the names of two other persons, with the word "witness" written opposite each of the two, and a date, "April 11, 1838." Both of the witnesses were dead. At the top of the will there was a date, "Feb. 14, 1832," and it was proved that the body of the will and the testator's name were in his writing, and that the names of the witnesses were in their handwriting, but the writing of the first witness was in paler ink than what followed. It was admitted that the body of the will was written in 1832, and probate of the will was granted as of the date of April 11, 1838. In *Wright* v. *Rogers* (2) there was an attestation clause signed by two persons; and, while one of these witnesses said that it was duly executed, the other, after the death of the first witness, for the first time stated that it was not witnessed in the testator's presence. He was, however, disbelieved, and the Court pronounced for the will. In *In the Goods of Jane Thomas* (3), the names of three persons were subscribed to the will after the word "witness," but there was no attestation clause. Two of these three persons were dead, and their handwriting was proved. The surviving witness, whose name stood first of the three, deposed that, as well as he remembered, the testatrix and he were the only persons present when the will was signed, and that he told her that another witness was wanted, but was unable to recollect what further passed. There, acknowledgment in the presence of the

(1) 2 Sw. & Tr. 12.
(2) 38 L. J. (N.S.) P. & M. 67.
(3) 1 Sw. & Tr. 255.
(4) 1 Rob. 5.

two other persons was presumed, and probate was granted. That is a strong case. In *Burgoyne* v. *Showler* (1) the will was signed by the testator, and there were two witnesses, but the attestation clause was defective, and the witnesses were called. One of them did not recollect being present with the other when the will was signed, but both of them recollected signing as witnesses in the testator's presence. In that case also probate was granted.

In this case it must be taken as proved that a document to the effect mentioned in the statement of claim, and purporting to be the will of the deceased, was signed by him; that two names of friends of his, now deceased, were written underneath; that one of these names was a genuine signature; and that there is no evidence about the other name. What is the reasonable probability from these facts? Is it that the deceased did what he intended effectually or ineffectually? The presence of the two names is significant. Why two? Because two were necessary. Why have them at all—except to render the instrument valid? And there being no reason whatever to doubt the genuineness of the unproved signature, is it not a reasonable inference to infer its genuineness? If it is, and there is no reason to suppose that anything was done irregularly or improperly, may it not be reasonably inferred that all was done properly, although there was no attestation clause to say so?

These appear to me to be the two ultimate questions. Butt, J., has inferred that the unproved signature was genuine, and that everything was regularly done. I am not prepared to say he was wrong.

I can find no case that goes so far as this; but authorities are only of use as guides when a case turns on inferences of fact. The extent to which the supposed will was acted upon after the death of the deceased tends to support the inference in favour of its validity; whilst its destruction by the widow (if indeed she destroyed it) tends the other way. The cardinal point is, that the Judge who saw and heard the witnesses came to the conclusion that the name of the deceased at the end of the alleged will was his genuine signature. Given this, and the other uncontroverted facts of the case, and I think that the Judge was justified in

(1) 1 Rob. 5.

1890

HARRIS v. KNIGHT.

drawing the inferences which he did, and in pronouncing for the will.

LOPES, L.J. I regret that I am unable to take the same view as Cotton, L.J. When it is stated that the alleged will in this case is not produced, that the attesting witnesses are both dead, that the handwriting of one only of them can be proved, and that there is no attestation clause, it will be readily understood that those propounding the will have exceptional difficulties to encounter. They are compelled to rely entirely on secondary evidence, both as to the contents of the will and its due execution: secondary evidence which the learned Judge has properly admitted on proof that the alleged will had been destroyed, and that both the attesting witnesses were dead.

In these exceptional circumstances the learned Judge had amongst other things to determine whether he ought, in the absence of any evidence on the subject, except so far as anything could be inferred from what was said to have appeared on the face of the alleged will, and the other circumstances of the case, to presume that the testator had signed the alleged will in the simultaneous presence of two attesting witnesses.

It is clear that a document purporting to be a will, bearing at its end the name of the testator William Knight, and the names of Earles and Heningham, existed at the time of the testator's death. There is no doubt but that this document had previously existed for some two years; that it was placed on the coffin before the testator was buried; that it was handed by the widow to the Defendant, and that he took it and read it aloud at the funeral.

Practically the contents of this document are admitted, and there is strong evidence to shew that it disposed of the property in accordance with the expressed intention of the testator. There is evidence, too, that the testator had stated that he had made a will. Moreover, the disposition is reasonable and probable.

There was in the Court below conflicting evidence with regard to the signature of the testator. The learned Judge came to the conclusion that the signature was that of William Knight, the testator. I should not readily, in a matter of this kind, dissent

from the Judge who saw and heard the witnesses, but in this case, on the evidence, I should have arrived at the same conclusion. James Harris, the son-in-law (said by the learned Judge to be a respectable person and worthy of credit), swears to the signature. The defendant, who denied the signature at the funeral, and whose interest it was to upset the will, never took the trouble to inquire of the attesting witnesses whether it was his father's signature, and whether they had attested that signature, although they both lived near him, and Earles was a relative of his wife's, but allowed the widow to remain in the possession of the property until her death. These and other circumstances induce me to think that the learned Judge was right in holding that the signature was the signature of William Knight, the testator.

The circumstances with regard to the destruction of the alleged will are mysterious. Whether it was actually destroyed by the mother, or the son, or both, and with what motive, and what became of it, it is difficult to speculate, but that the document destroyed was the alleged will I entertain no doubt.

How, then, does the case stand? The evidence places before me, and I look at, a document made two years before the death of the testator, and left about so that it might be read by members of the family, disposing of the testator's property in a way he desired, in a reasonable and probable way, having at its foot his signature, and in the place where you would expect to find the names of the attesting witnesses, the names of Earles and Heningham, both friends of the testator, and living near him.

There is no attestation clause; the attesting witnesses are both dead, and the handwriting of only one of them is proved.

Unless those two witnesses were simultaneously present when the testator signed his name, and acknowledged his signature, the will cannot stand. There is nothing to shew they were not. What is the fair and probable inference to be drawn from all the circumstances of the case? The presumption "Omnia rite esse acta" is an inference of fact—an inference of reasonable probability. The testator clearly knew he must sign; he knew that there must be two witnesses; is it not more probable than not; that he also knew that those witnesses must be present together,

1890

HARRIS v. KNIGHT.

Lopes, L.J.

and is it not more probable than not, that the signature which purports to be Heningham's signature, is his signature? It is inconceivable that the defendant, if he really had any doubt about the due execution of the will, would not have made inquiries of Earles and Heningham. His conduct is more consistent with a belief that the will was duly executed than with any other view.

The inference to be drawn in cases of this kind depends upon a number of circumstances peculiar to the cases in which they arise, and the presumption "Omnia rite esse acta" applies with more or less force according to the circumstances of each case. In every case of this kind the Court should be influenced by a desire that the intention of the testator should not be frustrated, when the execution of the testator is sufficiently proved, and the will, on its face, complies with the requirements of the statute.

The learned Judge has decided that he ought to presume, having regard to all the circumstances of the case, that this will was duly executed. I am unable to say that he was not justified in so presuming.

Appeal dismissed.

Solicitors: *Tidy & Tidy; W. M. Willcocks.*

W. W. R.

IN THE GOODS OF A. C. GRANET DE LA RUE.

1890
July 8, 15.

Probate—Two Wills—Property in England and Switzerland disposed of separately—Probate of English Will alone granted.

The testator executed two wills—one according to the English form, appointing executors, and disposing solely of his property in this country, the other according to the Swiss form, by which no executors were appointed, which purported to be entirely independent of the English will, and which affected only property in Switzerland and Italy:—

Held, on an affidavit being filed that if the English executors intermeddled with the Swiss estate they would come into conflict with the Swiss Court, which by the law of the country had the administration of the estate, and, on a copy of the Swiss will being filed, that probate might be granted of the English will alone.

APPLICATION for probate.

The testator, Augustin Charles Granet de la Rue, died on March 29, 1890, at Villa Schonwil, Meggen, in Switzerland, possessed of property in Great Britain, in Switzerland, and in Italy. On August 14, 1889, he made a will according to the English law disposing of his property in this country. The will declared that it was made for the purpose only of disposing of his estate, real and personal, situate in Great Britain and Ireland, and that it was to take effect concurrently with and independently of another will which the testator had made on July 6, 1889, relating to his property in Switzerland and Italy only, and not in any way disposing of his property in the United Kingdom.

B. Deane, moved, on behalf of the executors of the English will, that probate might be granted of it alone without bringing in the Swiss will. There is a certified copy of the Swiss will which could be filed.

[He cited *In the Goods of Astor*. (1)]

THE PRESIDENT. I am afraid of giving rise to difficulties and complications which one is not able to foresee in regard to dealing with property in this way. In the case cited I was influenced to some extent by the enormous bulk of the document. But here the will is a short document, and I should like

(1) 1 P. D. 150.

1890

IN THE GOODS OF DE LA RUE.

to know what particular objection there is to bringing it in. It is obviously a great convenience to persons interested in the testamentary dispositions of a deceased that they should have an opportunity of seeing all the documents.

B. Deane. The difficulty is in procedure. If the executors were required to take probate of the Swiss will as well as the English will they may come into conflict with the Swiss Court which has the administration of the estate, there being no executors appointed under the Swiss law.

THE PRESIDENT. If that is so, there should be an affidavit as to the Swiss law and practice.

On July 15, *B. Deane* read an affidavit from a Swiss advocate stating that if the executors of the English will were obliged to take out probate of the Swiss will they would have no power to deal with the Swiss estate, and if they attempted to deal with it they would come into conflict with the officer of the Swiss Court, whose duty it was under the Swiss law to administer the estate disposed of under the Swiss will.

THE PRESIDENT made an order granting probate of the English will alone to the executors without bringing in the Swiss probate, but requiring a certified copy of the Swiss will to be filed.

Solicitors: *Johnson, Budd, & Johnson.*

W. L.

June 10, 24.

NUNNELEY *v.* NUNNELEY AND MARRIAN.

Divorce—Settlement in Scotch form—Variation—22 & 23 Vict. c. 61, *s.* 5.

A decree for dissolution of marriage having been granted on the husband's petition, it appeared that the respondent, a Scotchwoman, was married in Scotland to the petitioner, an Englishman, and that in contemplation of the marriage there had been a settlement of her property according to the Scotch law:—

Held, that under 22 & 23 Vict. c. 61, s. 5, the Court had power to order a variation of the settlement.

APPLICATION to confirm the registrar's report on a petition by the husband for the variation of settlements after a decree abso-

lute had been pronounced in this Court dissolving the marriage on the ground of the wife's adultery with the co-respondent. The petitioner was a domiciled Englishman, and the respondent's domicil of origin was Scotch. Two settlements were executed in contemplation of the marriage, the first of which, relating to the property belonging to the petitioner, was in the English form, while the second, dealing with the property belonging to the respondent, and including realty in Scotland and personalty invested in securities, was in the Scotch form. It was agreed before the registrar that the wife's interest under the first settlement should be extinguished as though she were dead; but as to the second settlement, the trustees objected to an arrangement agreed on between the parties on the ground that it was for the Scotch Court, before which the matter was pending, to decide what should be done, especially having regard to the interests of the children, inasmuch as the Scotch law, as it was stated, would regard the wife as dead by reason of her having been proved guilty of adultery.

Middleton, for the petitioner.

Barnard, for the respondent, consented to the confirmation of the registrar's report subject to an alteration which had been agreed on.

B. Deane, for the trustees. The settlement is subject to Scotch law, and the wife's interest is entirely extinguished by the decree of divorce. The children thereupon become entitled to the fund absolutely. [He cited *Harvey* v. *Farquhar*. (1)]

This matter of variation of settlements is now pending before the Scotch Courts, and the trustee is in danger of having two orders made against him. He is not here as a litigant, but to take the opinion of the Court upon the matter. The settlement was made before marriage by a Scotchwoman and in Scotch form, and the lex loci contractus must prevail.

[THE PRESIDENT. You must convince me that the law of Scotland is as you say. The decree of divorce deals only with the persons, not with the property. The variation of settlements is a result following on that decree.]

(1) Law Rep. 2 H. L., Sc. 192.

1890

NUNNELEY v. NUNNELEY AND MARRIAN.

Middleton, in reply. The marriage having been dissolved in this Court, the settlements made in contemplation of the marriage must be dealt with by s. 5 of 22 & 23 Vict. c. 61, which empowers this Court to vary settlements.

Cur. adv. vult.

THE PRESIDENT. This was the case of a lady who, being Scotch by birth, was married in Scotland, and whose property was settled under Scotch law. There was a second settlement, in English form, of the husband's property. The parties have applied jointly for a variation of the settlements, and the only question now is, whether I have power to deal with the Scotch settlement. The language of the Act is exceedingly wide (1). I am clearly of opinion that the power thereby conferred extends to a settlement though made in another country and according to the law of that country. It is clear that the present respondent, who was up to the time of her marriage a Scotchwoman, by marrying an Englishman acquired her husband's English domicil and became subject to the law of England. I have no reason to doubt that I have power to make the desired variation in the marriage settlement in question, and I accordingly accede to the application. I may say, moreover, that I consider it to be for the children's benefit that the order should be made.

Solicitors for the husband: *Fallows & Rider.*
Solicitors for the wife: *Robbins, Billings & Co.*
Solicitors for the trustee: *Fallows & Rider.*

(1) 22 & 23 Vict. c. 61, s. 5.

W. L.

[DIVISIONAL COURT.]

1890
April 28, 29; *Aug.* 5.

THE WARWICK.

Collision—Trawler—Regulations for Preventing Collisions at Sea—Art. 10 (*d*) *—Mutual Collision Club—Arbitration.*

By art. 10 (*d*) of the Regulations for Preventing Collisions at Sea, "if a vessel when fishing becomes stationary, in consequence of her gear getting fast to a rock or other obstruction, she shall shew the light and make the fog signal for a vessel at anchor":—

Held, that the rule is applicable although the weather, when the vessel becomes stationary, is clear.

In an action for collision, it appeared that the plaintiff's vessel and the defendant's vessel were insured in a mutual insurance company, by the rules of which it was provided that, in the event of a collision occurring between two vessels insured in the company, &c., the owners of such vessels should immediately submit a statement of the whole circumstances of the collision . . . . . and the directors, after receiving such statement, should have power to arbitrate on the matter, and their decision should be final.

The plaintiffs gave notice of the collision to the secretary of the company. The secretary obtained statements as to the collision from the master of the plaintiff's vessel, and from the master of the defendant's vessel. A meeting of directors was held, at which the defendant's master was present, but no one on behalf of the plaintiff, and a resolution was passed that the defendant's vessel had not been in collision with that of the plaintiff:—

Held, that there had never been a proper hearing of the case by the directors; that the resolution passed by them was therefore not an arbitration within the meaning of the rule, and that the plaintiff was not estopped by it from bringing an action for damage.

Semble, that the rule must be taken to mean that it should be a condition precedent to an arbitration that both parties had agreed as to the fact of a collision having taken place.

APPEAL from a judgment of the county court judge of Kingston-upon-Hull, whereby he held the plaintiff's vessel the *Birkbeck*, and the defendant's vessel the *Warwick*, to blame for a collision between these vessels. The vessels were trawlers, and the learned judge held that the plaintiff's vessel was to blame for not complying with art. 10 (*d*) of the Regulations for Preventing Collisions at Sea. (1) The learned judge also held, that though the defendant's vessel the *Warwick* was also in

(1) Art. 10 (*d*): "If a vessel when fishing becomes stationary, in consequence of her gear getting fast to a rock or other obstruction, she shall shew the light and make the fog signal for a vessel at anchor."

1890

THE WARWICK.

fact to blame, the jurisdiction of the Court had been ousted by an arbitration held under the rules of the Hull Smackowners' Mutual Collision Club (in which the plaintiff's and the defendant's vessel were insured), and he therefore gave judgment for the defendant.

As regards the first point, it appeared from the evidence that the *Birkbeck* was trawling, and her trawl became fast. The weather was clear at the time, and flare-up lights were being shewn from the *Birkbeck*, but no fog signal, when the *Warwick* ran into her trawling gear. The point that the County Court had no jurisdiction, on the ground that the trawl of the *Birkbeck* was injured only and not the vessel herself, was not insisted on at the hearing of the appeal.

As regards the arbitration, both plaintiff and defendant were members of the Hull Smackowners' Mutual Collision Club, Limited. On February 1st, 1889, the plaintiff's agent reported the collision to the secretary of the club; he was accompanied by the master of the smack, and their statements were put into writing. A letter was written to the defendant, to acquaint him with the complaint of the plaintiff, and the defendant's mate made a report in writing to the committee. On March 20, a meeting of six directors of the company was held, five being a quorum. The defendant's master was examined, the two statements mentioned above were read, and one director then moved and another seconded, that the *Warwick* had not been in collision with the *Birkbeck*. This was carried unanimously, and the claim of the plaintiff was therefore dismissed. At a subsequent meeting on July 12, the plaintiff appeared at a general meeting of the directors, and he was informed that they had decided against him.

Rule 56, which was that under which the directors had acted, was as follows:—

"In the event of a collision occurring between two vessels insured in this company, or their respective trawling gear, and damages being caused thereby to either or both of the said vessels or their gear, the owners of such vessels shall immediately submit a statement of the whole circumstances of the collision as mentioned in art. 53, and the directors, after receiving such

statement, shall have power to arbitrate on the matter, and their decision in the matter shall be final and conclusive. Under no circumstances whatever shall one member of the company be allowed to go to law with another, but in all cases he shall abide by the decision of the directors. In the event of any member declining to fulfil the conditions of this article, he shall forfeit all claim upon the company in respect of the collision which is the subject-matter of the dispute."

Bucknill, Q.C., for the plaintiff. First, as to the alleged breach of the regulations. Art. 10 (*d*) is only intended to apply to a vessel which becomes stationary in a fog, not when the weather is clear. As to the arbitration, there was not a proper submission, hearing, or award. [He referred to *Edwards* v. *Aberayron Mutual Ship Insurance Society*. (1)]

Sir W. Phillimore, and *Butler Aspinall*, for the defendant. Art. 10 (*d*) was intended to include a case such as the present one. As to arbitration, there was no misconduct so as to oblige the Court to treat it as a nullity, and there was in substance a submission, hearing, and an award, though no formalities were observed.

Bucknill, Q.C., in reply.

Cur. adv. vult.

Aug. 5. The judgment of the Court (Sir J. Hannen, President, and Butt, J.) was delivered by

BUTT, J. On the argument of this appeal we intimated (in fact there was no serious contest on these matters) that the learned judge of the Court below was right in deciding that he had jurisdiction to try the case, and that the plaintiff must be held to blame for a breach of the statutory regulations for preventing collisions at sea. We also agree with the learned judge in holding that the evidence establishes a case of negligence against the *Warwick*, and that she must be pronounced in fault as well as the plaintiff's vessel, unless her owner can shew that the matters in dispute in this action have been determined by arbitration.

(1) 1 Q. B. D. 563.

1890

THE WARWICK.

Butt, J.

It was on this point that we required time for consideration.

At the hearing in the county court the defendant contended that there had been a valid submission to arbitration of the whole of the plaintiff's claim; a proper hearing of the case by the arbitrators; and a binding award; and the learned judge, although his language intimates considerable doubt, must be taken to have so decided. We are unable to agree with that decision.

The first question arises on clause 56 of the articles of association of the Hull Smackowners' Mutual Collision Club, Limited.

It is worthy of remark that this clause only authorizes the directors to act as arbitrators "in the event of a collision between two vessels insured in this company, or their respective trawling gear"—words which seem to imply an agreement between the parties concerned as to the fact of a collision having happened, as a condition precedent to the right of the directors to adjudicate on the incidents of a collision. The resolution of the board relied upon by the defendant as an award asserts that no such collision happened.

It is not clear what clause 56, either alone or read and considered in conjunction with some of the other provisions of the articles of association, means. Whether it contemplates a reference to the directors of the question of the rights and liabilities of the club and its members inter se, as mutual insurers to the extent of 30*l.* on each vessel, or of all the rights and liabilities of the owners of smacks that have come into collision, or of both these matters.

One thing seems clear from the book of the society produced on the argument, viz. that it is not the practice of the directors acting under clause 56, and in ordinary circumstances, to decide the whole matter, including the quantum of damage done and suffered by the respective parties. In the only case in which they have done so they procured an express authority from the parties in dispute over and above the prescriptions of clause 56.

Now, it is true that it may not be proper to invoke the practice of the directors in order to interpret the meaning of the clause; but the various clauses of the articles of association being contradictory and practically unintelligible, we think it open to us,

when certain acts of the plaintiff or his agents are relied on by the defendants as evidence of his intention to submit, and of his having in fact submitted his whole claim to arbitration, to inquire what the practice of the directors in these cases has been. On the best consideration we have been able to give to the case, we have come to the conclusion that the evidence does not establish the contention that the plaintiff ever intended to submit, or did in fact submit, the whole of his claim against the *Warwick* to the decision of the directors.

We, moreover, differ from the finding of the learned judge that there was a hearing (which must be taken to mean a proper hearing) of the case by the directors.

Clause 56 of the articles of association provides for arbitration by the directors, and not by a quorum of the directors of the company; and it is not perfectly clear that a hearing and decision by some of the directors (although sufficient in number to form a quorum in ordinary matters) would constitute a valid and binding award.

However this may be, there certainly never has been a proper hearing of the case by the directors. It is clear from the evidence of the secretary of the association that the notice convening the meeting of the directors on March 20, 1889 (the day of the alleged hearing), contained no reference to this matter; that the plaintiff had no notice of such meeting; that neither he nor his agent was present; that although the captain of the defendant vessel was then examined, no opportunity was afforded the plaintiff of testing his evidence by cross-examination or of calling any witness on his own behalf. The plaintiff was in fact not heard.

It was urged that the objection to the proceedings at the hearing could only be properly raised on a motion to set aside the award.

However this may be (and the matter is not free from doubt) we have thought it right to state our opinion, because the learned judge of the Court below says in his judgment: "I felt bound to hold, that while the so-called arbitration hardly deserved that name, still it was a hearing, and that the resolution was an award."

1890

THE WARWICK.

Butt, J.

On the whole, and although the case is not free from doubt, we have come to the conclusion that the defendant has failed to establish that part of his case which sets up a reference and award in answer to this action, and that the judgment of the Court below must be altered by a decree pronouncing both vessels to blame.

Solicitors for plaintiff: *Stokes, Saunders, & Stokes.*
Solicitors for defendant: *Pritchard & Sons.*

E. S. R.

July 10, 12.

THE TALABOT.

Collision—Foreign River—Steam Vessels proceeding one up and the other down River—Navigation.

In an action for collision between two vessels under steam in the River Scheldt, it appeared that the vessels were proceeding in opposite directions, the one up and the other down the river, and that the vessel going up the river had the tide against her. The collision took place at a strong bend of the river. It did not appear that any positive rule had been printed and circulated with regard to the navigation of the river; but, by the practice of navigation there, it was the duty of a vessel navigating against the tide to wait until a vessel coming in the opposite direction had cleared her at the bend:—

Held—upon proof that the vessel navigating against the tide had disregarded this practice—that she must be taken to have been to blame for the collision.

ACTION of damage by collision. The plaintiffs were the owners of the steamship *Trevethick*, and the defendants were the owners of the steamship *Talabot*. The collision took place on January 22, 1890, in the Scheldt, about seven or eight miles below Antwerp. The *Trevethick* at the time was proceeding up the river, and the *Talabot* was coming down. The tide at the time was ebbing.

Barnes, Q.C., and *Pyke*, for the plaintiffs.
Sir W. Phillimore, and *Aspinall*, for the defendants.

BUTT, J. The collision in this case occurred at night, in the River Scheldt, a little below Antwerp. The *Trevethick* was bound up, and the *Talabot* down the river. There was a tide or current, described as a freshet, running down at the rate of two knots or so. The *Trevethick* had the tide, therefore, against her,

and the *Talabot* the tide with her. The place of collision is near a buoy on the river, a little above the Kriusschans lighthouse, to which reference has been repeatedly made in the course of the case. The lighthouse and buoy in question are at a strong bend of the river, the two reaches being at right angles, the one to the other. In the River Thames there is a well-recognised and positive rule (No. 23) of the Thames Conservancy to the effect that, when vessels are approaching each other, at bends such as I have described, it is the duty of the one having the tide against her to ease her engines, and to wait under the point until the other vessel has passed it. There is, so far as appears from the present case, no such positive rule printed and circulated with regard to the navigation of this Belgian river; but the pilots agree that the practice of navigation is really the same as that prescribed in the rules for the navigation of the Thames. The vessel having the tide against her is to wait until the vessel coming in the opposite direction has cleared her at the bend. It is quite certain that the *Trevethick* disregarded that practice, and I have no hesitation in saying that she was to blame for so doing. Nay, more; if there had been no such practice on the River Scheldt, both I and the Trinity Brethren are of opinion that it was bad navigation for the vessel with the tide against her to proceed as she did under the circumstances. It certainly does not weaken these observations to know that the man in charge of her was reprimanded by the local authorities for not having obeyed the recognised practice. In the Scheldt, as in other narrow channels, there is a further rule, that vessels approaching in opposite directions shall pass one another port side to port side, and that, in order to do this, each shall keep to that side of mid-channel which is on her starboard hand; in other words, each has about half the channel devoted to her as her own water. There is no doubt that one or other of the steamers in the present case had got across into the water of the other. Which it was is one of the disputed points. We are of opinion that the *Trevethick* got from her own water, on the southern side, into the water which should have been left open to the *Talabot* on the other or Antwerp side of the river. There are many considerations to induce the Court to take that view;

1890

THE TALABOT.

Butt, J.

an important one being that, almost immediately after the collision, the *Talabot* went aground on that side. But navigating a narrow channel such as this at night, either pilot, without negligence and without default, might have got his vessel out of his proper water into that of the other. We should not, necessarily, impute blame for that. But it is not necessary to decide that matter, the chief and all-important point being that, at such a marked bend of the river, it was the imperative duty of the *Trevethick* to ease and to wait for the *Talabot* to round the point. As to the speed at the time, we think both vessels acted properly in going slowly and in stopping and reversing when the collision became imminent. Therefore, the *Trevethick* is alone to blame for this collision, on the ground I have stated.

Solicitors for plaintiffs: *Gellatly & Warton.*
Solicitors for defendants: *Botterell & Roche.*

E. S. R.

March 10; *April* 29; *May* 3; *Aug.* 5.

[DIVISIONAL COURT.]

THE QUICKSTEP.

Damage—Tug and Vessel in Tow—Collision with third Vessel through Negligence of Tug—Liability of Vessel in Tow.

No general rule can be laid down as to the liability of a vessel in tow for a collision between it and a third vessel occasioned by the negligence of those on board the tug.

Whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so as to make the former liable, depends upon the circumstances of each case.

APPEAL by the defendants, the owners of the tug *Quickstep*, and the defendants, the owners of the hopper barge, No. 1, against the decision of the judge of the Durham County Court, in an action of damage, pronouncing the owners of both the *Quickstep* and the hopper barge liable for a collision with the plaintiffs' paddle steamer *Charles Dickens.*

The action was originally brought by the Tees Conservancy Commissioners, the owners of the paddle steamer *Charles Dickens*, against Messrs. Cochrane & Co., the owners of the hopper barge,

which at the time of the collision was in tow of the steam-tug *Quickstep*. Subsequently, William Duncan and Charles Chrystall Duncan, the owners of the *Quickstep*, were added as defendants.

The facts, so far as material for the purposes of the present report on the question of law only, were briefly as follows:—

On January 4, 1889, about 7.20 A.M., the paddle steamer *Charles Dickens* was proceeding down the River Tees, and, when about off the graving dock entrance, saw the masthead and red light of the *Quickstep*, which, with the hopper barge in tow, was heading up the river, having come out from the buoys on the south shore with the intention of straightening down. Owing to the absence of a second masthead light to indicate that the *Quickstep* was towing, the *Charles Dickens* came into collision with the hopper barge, and sustained such injuries that she had to be beached. The hopper barge carried a proper light, had two men on board, and had a rudder. It was admitted that there was no interference by those on board the hopper barge with the navigation of the tug.

The county court judge found that the collision was caused by the negligence of those on board the *Quickstep*, and that there was no negligence on the part of those in charge of the *Charles Dickens* or of the hopper barge; but he held the owners of the hopper barge, as well as the owners of the *Quickstep*, liable on the ground that the owners of the hopper barge, having employed the *Quickstep* to tow the barge, those on board the *Quickstep* were, as matter of law, at the time of the collision the servants of the owners of the hopper barge.

The owners of the *Quickstep* appealed against the decision, on the ground that the collision was brought about by excessive speed and bad look-out of the *Charles Dickens*. The owners of the hopper barge appealed, on the ground that the crew of the tug were not, in the circumstances, the servants of the owners of the vessel in tow.

Barnes, Q.C., and *W. S. Robson*, for the appellants, the owners of the *Quickstep*.

Raikes and *Lennard*, for the appellants, the owners of the hopper barge.

1890

THE QUICKSTEP.

Bucknill, Q.C., and *Pyke*, for the respondents, the owners of the *Charles Dickens*.

On the facts, the Divisional Court agreed with the Court below in finding the *Quickstep* to blame for not having a second light up, but held that there was negligence on the part of the *Charles Dickens* in not seeing the light of the hopper barge, owing to bad look-out. The Court, therefore, pronounced both the *Quickstep* and the *Charles Dickens* to blame for the collision, and adjourned the argument on the point of law whether, although no negligence was attributable to the tow, her owners nevertheless were liable for the negligence of the tug.

1890. April 29, May 3. The point of law was argued. The arguments of counsel sufficiently appear from the judgment. In addition to the cases and text-books therein cited, the following were also referred to:—

For the appellants, the owners of the hopper barge: *The Ticonderoga* (1); *The Julia* (2); *The Energy* (3); *The American and the Syria* (4); *River Wear Commissioners* v. *Adamson* (5); *The Stormcock* (6); *Jones* v. *Corporation of Liverpool* (7); *The Isca* (8); *The Niobe* (9); *The Tasmania* (10); Marsden on Collisions. (11)

For the respondents, the owners of the *Charles Dickens*: *The Duke of Sussex* (12); *The Gipsey King* (13); *The Kingston-by-Sea* (14); *The Giraffe* (15); *The Cleadon* (16); *The Two Ellens* (17); *The Jane Bacon* (18); *The Mary* (19); *The Sinquasi* (20); *The Bianca* (21); and the American case, *Smith* v. *The Creole*. (22)

Cur. adv. vult.

(1) Swa. 215.
(2) Lush. 224.
(3) Law Rep. 3 A. & E. 48.
(4) Law Rep. 6 P. C. 127.
(5) 2 App. Cas. 743.
(6) 5 Asp. (M.C.) (N.S.) 470.
(7) 14 Q. B. D. 890.
(8) 12 P. D. 34.
(9) 13 P. D. 55.
(10) 13 P. D. 110.
(11) 2nd ed. 197.
(12) 1 W. Rob. 270.
(13) 2 W. Rob. 537.
(14) 3 W. Rob. 152.
(15) 1 Pritch. Ad. Dig. 3rd ed. 235.
(16) Lush. 158.
(17) Law Rep. 4 P. C. 161.
(18) 27 W. R. 35.
(19) 5 P. D. 14.
(20) 5 P. D. 241.
(21) 8 P. D. 91.
(22) 2 Wallace Jr. Rep. 485.

Aug. 5. The judgment of the Court (Sir J. Hannen, President, and Butt, J.) was delivered by

BUTT, J. [The learned judge stated the facts above set out, and, after referring to the judgment already given on those facts, proceeded:—]

The question as to the liability of the owners of the barge for the negligence of the crew of the *Quickstep* was subsequently argued before us, and it is that question which we now have to decide.

It is clear that, although there were men on board the barge, the navigation was in the hands of the master of the tug, and the bargemen could do nothing to avoid the collision.

No doubt in many cases of towage the negligence relied on as making the owners of the vessel in tow liable for a collision has been the negligence of those on board the tug; and where, as in most of such cases, the navigation was under the direction of those on board the vessel being towed, such negligence has been rightly held to be in law the negligence of her owners. In one or two cases in the Court of Admiralty, Dr. Lushington seems to have intimated that the inexpediency of having a divided command and direction of the vessels would in itself be a sufficient reason for attaching liability to the vessel in tow. In all such cases, however, the real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam-tug. Unless that relation exists, considerations of expediency cannot avail to impose liability on the owners of the vessel in tow. It is the practice on the Tees, as in many of our rivers, for steam-tugs to tow several barges at the same time. The barges frequently belong to different owners. In such cases, whose servants are the crew of the tug? Supposing barges A, B, and C, each belonging to a different owner, to be in tow of one steam-tug, and damage to be caused to another vessel by the negligence of the master of the tug, is each of the owners of the barges to be held liable for the damage done on the ground that the crew of the steam-tug are his servants? If so, it would follow that if, by the negligence of those on board the tug, barge A is brought into collision with another vessel, the owners of barges

1890

THE QUICKSTEP.

Butt, J.

B and C would each be liable for the damage so caused—a conclusion which would not seem consistent with reason or with good sense.

The truth is, no general rule can be laid down. The question whether the crew of the tug are to be regarded as the servants of the owner of the vessel in tow must depend upon the circumstances of each case.

There would seem to be no better reason for holding the master of the tug, in the present case, to be the servant of the owners of the barge, than there is for saying that the master of a ship engaged in carrying cargo is the servant of the charterer, and so may render the latter responsible for a collision caused by the negligence of the master of the vessel.

It would be a hopeless task to attempt to reconcile the numerous decisions bearing on the subject in our English Courts. Nor are the American cases more uniform in their result. We think the right view of the law is that stated by Lord Tenterden and Littledale, J., in the case of *Laugher* v. *Pointer* (1), adopted and approved by the Court of Exchequer in *Quarman* v. *Burnett*. (2) Both those cases were actions for negligence in driving a carriage. In the earlier case, Lord Tenterden said:—(3)

"If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with or without a carriage, must not the person who hires a hackney coach to take him for a mile, or other greater or less distance, or for an hour, or longer time, be answerable for the conduct of the coachman? Must not the person who hires a wherry on the Thames be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked if anyone should affirm the hirer to be answerable in either of these cases. . . . . If the case of a wherry on the Thames does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the

(1) 5 B. & C. 547. (2) 6 M. & W. 499.

(3) 5 B. & C. at p. 578.

negligent management of such vessels, and many actions have been brought against their owners; but I am not aware that any has ever been brought against the charterer, though he is to some purposes the dominus pro tempore, and the voyage is made not less under his employment, and for his benefit, whether he be on board or not, than the journey is made under the employment, and for the benefit of the hirer of the horses. Why, then, has the charterer of the ship, or the hirer of the wherry, or the hackney coach, never been thought answerable? I answer, because the shipmaster, the wherryman, and the hackney coachman, have never been deemed the servants of the hirer, although the hirer does contract with the wherryman, and the coachman, and is bound to pay them, and the pay is not for the use of the boat, or horses, or carriage only, but also for the personal service of the man." . . .

BENGAL SECRETARIAT LIBRARY

In conformity with this, Mr. Justice Clifford, in delivering the judgment of the Supreme Court of the United States of America in the case of *Sturgis* v. *Boyer* (1), says (2): "But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such employment, undertakes to transport another vessel, which, for the time being, has neither her master or crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels. . . . . Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, the tow under the circumstances is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel.

(1) 24 Howard's Rep. 110. (2) Page 122.

1890

THE QUICKSTEP.

Butt, J.

In a note to p. 536 of his work on Shipping, Mr. Parsons, after reviewing the cases decided in the United States, says: "It seems to be well settled law that canal boats and barges in tow are considered as being under the control of the tug, and the latter, therefore, is liable."

We think that both reason and authority are in favour of holding the owners of the barge exempt from liability for the negligence of the crew of the *Quickstep*. The result is that we pronounce the *Charles Dickens* and the *Quickstep* both to blame, and dismiss the claim against Messrs. Cochrane & Co., with costs here and in the Court below to be paid by the plaintiffs.

Appeal of the owners of the hopper barge allowed.

Hurst, for the appellants, the owners of the *Quickstep*, asked for the costs of the appeal.

Pyke, for the respondents, the owners of the *Charles Dickens*. The rule is that where a collision has occurred between two vessels, through the bad management of each of them, the owners of the ships are not entitled to the costs of any litigation arising out of the collision: *The Hector*. (1)

THE PRESIDENT. As our decision is that both the *Quickstep* and the *Charles Dickens* are to blame, the rule laid down in *The Hector* (1) will be followed, and there will be no costs here or below as between the owners of those two vessels. The costs of the hopper barge we have already dealt with.

Solicitors for the appellants, the owners of the *Quickstep*: *Thomas Cooper & Co.*

Solicitors for the appellants, the owners of the hopper barge: *Hollams, Sons, Coward & Hawksley.*

Solicitors for the respondents, the owners of the *Charles Dickens*: *Clarkson, Greenwells & Co.*

(1) 8 P. D. 218.

E. S. R.

THE CARRON PARK.

1890
April 25;
Aug. 5.

Ship—Charterparty—Exception—Negligence of Crew—"Voyage"—Warranty of Seaworthiness—General average Contribution.

By a charterparty it was agreed that the defendants' steam vessel should go to New Fairwater, and there load from the agents of the plaintiffs a cargo of sugar and proceed therewith to Greenock, the defendants not to be responsible "for any act, neglect, or default whatsoever of their servants during the said voyage." The agents commenced loading the vessel with sugar belonging to the plaintiffs, and during the loading the cargo was damaged by water through a valve in the engine-room having been negligently left open by one of the engineers of the vessel:—

Held, that the term "voyage" included the period of time during which the vessel was being loaded, and that consequently the damage was within the exception and the defendants were not liable.

The defendants counterclaimed for a general average contribution from the plaintiffs:—

Held, that their right to contribution was not affected by the negligence of their servants, for which by the terms of the exception they were not responsible, and that they were entitled to recover.

ACTION for damage to cargo.

The plaintiffs were charterers of the steamer *Carron Park*, of which the defendants were owners. By a charterparty it was agreed that the *Carron Park*, "now on passage to Fraserburgh and Lebau," being "tight, staunch, and strong, and every way fitted for the voyage," should proceed to New Fairwater and there load a full cargo of sugar, and proceed therewith to Greenock and there deliver the same. The last clause of the charterparty was (with omissions) as follows: ". . . neglect or default whatsoever of the pilot, master, crew, or other servants of the shipowners . . . and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage always excepted." The further material facts of the case are stated in the following admissions.

"That the vessel, in pursuance of the charterparty, arrived in New Fairwater in ballast on October 13, 1889, being at that time tight; staunch, and strong, and in every way fitted to receive and carry a cargo in accordance with the charterparty. That on

1890

THE CARRON PARK.

October 14 the plaintiffs by their agents commenced to load the vessel, in accordance with the charterparty, with sugar in bags the property of the plaintiffs, and that the loading was continued until the evening of October 15, but was not completed. That on the morning of October 16, while the vessel was still lying moored at her loading berth, when preparations were made to continue the loading of the cargo, three feet of water or thereabouts was discovered in the after-hold engine-room and stokehole. That the water was pumped out and cargo discharged, when it was found that the portion of the cargo in the after-hold, the property of the plaintiffs, was damaged and injured in consequence of the water getting into that hold. That the water found its way into the vessel through a valve in the engine-room, which had been negligently left open by one of the engineers of the vessel for some period between the time when work was left off on the evening of October 15 and the time when the water was first discovered in the hold. That in all other respects the vessel was in good condition. That in consequence of the aforesaid accident the plaintiffs' cargo had been damaged and they had suffered loss."

The plaintiffs by their statement of claim claimed damages for the injury to the cargo on the *Carron Park*, on the ground that there was a warranty by the defendants that the *Carron Park* was seaworthy, which warranty had been broken; and in the alternative, on the ground that the injury was caused by the negligence of the defendants' servants. The defendants by their defence denied these allegations, and in the alternative relied on the exemption in the charterparty above set out; they also counterclaimed for a general average contribution.

L. Batten, for the plaintiffs. The facts shew that the vessel was unseaworthy, and that the unseaworthiness was the apparent cause of the injury; the defendants are therefore liable even though negligence was the cause of the unseaworthiness: *Steel* v. *State Line Co.* (1); *The Glenfruin* (2); *The Undaunted* (3): the warranty of seaworthiness applies to a vessel in port as this was:

(1) 3 App. Cas. 72. (2) 10 P. D. 103.
(3) 11 P. D. 46.

Cohn v. *Davidson.* (1) The exception in the charterparty relied on by the defendants does not apply to negligence occurring when the vessel is in port: *Crow* v. *Falk* (2); *Barker* v. *McAndrew.* (3) As to the counter-claim, such a claim as this for general average is quite unknown, and though the point has not before been decided, it is submitted that on authority the claim cannot be maintained. [He referred to *Strang, Steel & Co.* v. *Scott & Co.* (4); *The Ettrick* (5); *Johnson* v. *Chapman* (6); *Pirie* v. *Middle Dock Co.* (7); *Schloss* v. *Heriot* (8); *Fawcus* v. *Sarsfield* (9); *Crooks* v. *Allan.* (10)]

Barnes, Q.C., and *J. Walton,* for the defendants. The defendants are not liable; there is no evidence of unseaworthiness in fact, and even if the vessel were unseaworthy at the time in question it is immaterial, as the warranty of seaworthiness refers only to the period of the beginning of loading. Neither does the warranty of seaworthiness refer to a momentary defect as this was, but to the structural condition of the vessel. The exception in the charterparty applies to negligence in port: *Bruce* v. *Nicolopulo.* (11) The principle on which general average is claimed applies to this case, and it is governed by the decision of the Privy Council in *Strang, Steel & Co.* v. *Scott & Co.* (4)

Batten, in reply.

Cur. adv. vult.

Aug. 5. THE PRESIDENT (after stating the facts above set out, proceeded). There can be no doubt that the defendants would, unless exempted by the last clause of the charterparty, be liable for the damage caused to the plaintiffs' cargo by the admission of the water to the hold of the vessel. It arose from the direct negligence of the defendants' servants, and was a breach of the obligation of the shipowner that his servants should not be negligent in and about the carrying of the goods.

The question then arises whether the shipowners have freed themselves from liability for this negligence by the clause of

(1) 2 Q. B. D. 455.
(2) 8 Q. B. 467.
(3) 34 L. J. (C.P.) 191.
(4) 14 App. Cas. 601.
(5) 6 P. D. 127.
(6) 35 L. J. (C.P.) 23.
(7) 44 L. T. (N.S.) 429.
(8) 14 C. B. (N.S.) 59.
(9) 6 E. & B. 192.
(10) 5 Q. B. D. 38.
(11) 11 Ex. 129; 24 L. J. (Ex.) 321.

1890

THE CARRON PARK.

The President.

the charterparty, which stipulated that they should not be responsible for any act, neglect, or default whatsoever of their servants "during the said voyage."

It was contended for the plaintiffs that this only related to the voyage from New Fairwater to Greenock, and did not include the period of time during which the vessel was being loaded. And for this contention the case of *Crow* v. *Falk* (1) was cited. There the Court of Queen's Bench held, that "during the voyage" could only apply to the time after the voyage commenced, and that the voyage could not begin before the ship's loading was completed. Willes, J., who was counsel for the successful party in *Crow* v. *Falk* (1), stated in his judgment in the case of *Barker* v. *McAndrew* (2), that he did not concur in the judgment in *Crow* v. *Falk* (1); and in *Barker* v. *McAndrew* (2) it was decided that where a ship, described as then at N., being tight, staunch, &c., was to proceed to the usual place of loading at N., and there load and proceed to A., with the usual exceptions "during the said voyage," that the voyage commenced from her starting from her then berth, and that the exception applied to the preliminary transit to the port of loading.

In *Bruce* v. *Nicolopulo* (3) Pollock, C.B., stated that he could not subscribe to the case of *Crow* v. *Falk*, (1) and held with the other members of the Court that a preliminary voyage was to be considered part of the voyage contemplated by the contract. These cases appear to me to be conclusive of the present, and to lead to a result consistent with the intention of the parties; for I cannot doubt that the exception was not intended to apply only to the time after the vessel left the port of loading, but extended to the whole time during which the vessel was engaged in performing the contract contained in the charter.

It was further argued that the leaving open of the valve rendered the ship unseaworthy, and that thus the defendants were liable for breach of warranty that the ship was fit to receive cargo. It is admitted that the vessel was, when the loading commenced, fit to receive and carry the cargo, and that it was during an interval in the loading that the water was, by the negligence of the engineer, allowed to enter the ship and

(1) 8 Q. B. 467. (2) 34 L. J. (C.P.) 191.
(3) 11 Ex. 129; 24 L. J. (Ex.) 321.

damage the cargo already there. Holding, as I do, that the exception extends to a period anterior to the vessel leaving the port of New Fairwater, the negligent letting of the water into the vessel would be within the exception. It did not render the vessel unseaworthy for the reception of this cargo which had already been loaded on board the vessel when in good condition. It is, for the purposes now under consideration, as though during the passage from New Fairwater, the valve had been negligently opened—that is, it was, as Lord Blackburn said, in *Steel* v. *State Line Steamship Co.* (1) of leaving a port-hole open at sea, negligence on the part of the crew, and not unseaworthiness of the ship.

With regard to the counter-claim for general average, I think the defendants are entitled to recover.

The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not made to avert loss from himself alone, but from the cargo owner. This question was considered in the case of *Strang, Steel & Co.* v. *Scott & Co.* (2) That was a case of jettisoned cargo; Lord Watson, in delivering judgment, says, (p. 609): "The fault of the master being matter of admission, it seems clear upon authority that no compensation can be recovered by the owners of the" (ship) "unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers." Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract—that the shipowner shall not be responsible for the negligence of his servants in the events which have happened.

"I, therefore, give judgment for the defendants on the claim and counter-claim with costs.

Solicitors for the plaintiffs: *Waltons, Johnson, & Bubb.*

Solicitors for the defendants: *W. A. Crump & Son.*

(1) 3 App. Cas. 72. (2) 14 App. Cas. 601.

1890
July 25;
Aug. 7.

[IN THE COURT OF APPEAL.]

THE ACCOMAC.

Ship—Charterparty—Exception—Negligence of Crew—Voyage.

By charterparty it was agreed that the defendants' vessel should carry a cargo of rice for the plaintiffs to London. The charterparty excepted the defendants from liability "for any act, negligence or default of master or crew in the navigation of the ship in the ordinary course of the voyage."

The vessel, on her arrival in London, went into the Victoria Dock to discharge her cargo. While this was being done, the cargo was damaged by water which got into the vessel through negligence in the removal of a bilge-pump:—

Held, that assuming that the negligence which caused the damage was negligence on the part of the crew, it was not "negligence in the navigation of the ship in the ordinary course of the voyage" within the meaning of the exception, and that the defendants were liable.

APPEAL from a judgment of Butt, J., in an action for damage to cargo. The plaintiffs were the owners of a cargo of rice shipped at Rangoon in the defendants' vessel the *Accomac*, and carried by her to London. The *Accomac* on her arrival went into the Victoria Dock to discharge her cargo, and while this was being done one of the bilge-pumps, which had been found to be defective during the voyage, was removed by the workmen of Messrs. Rait & Gardiner, a firm of marine engineers employed for this purpose. To get the pump out it was necessary to take off a cock which closed one of the pipes. That pipe was connected with the ballast tanks, and was in such a position that, when they were once filled, the water would rise to a level with the pipe and the cock in question. The cock after it had been taken off was not replaced when the chief engineer opened the sea-cock for the purpose of filling the ballast tanks in order to stiffen the ship. He went away forgetting that the sea-cock was open, and the water passed through the unclosed pipe and ultimately reached the cargo and did it much damage. The plaintiffs claimed damages for the injury to the cargo.

The following are the material portions of the judgment of

BUTT, J. (The learned judge, after stating the above facts, proceeded:—) Now, having regard to the charterparty and bills

of lading, it is perfectly clear that unless the defendants, the shipowners, can bring themselves within one of the exceptions, they are liable for that damage. The question in the case is, do they bring themselves within the exception?

The exceptions are pasted or gummed on to the margin of the charterparty, and are in these words: "The act of God, the Queen's enemies, loss or damage from fire on board or hulk, and in craft or on shore, collision, any act, negligence or default whatsoever of pilots, master or crew, in the navigation of the ship and in the ordinary course of the voyage, and all other accidents at sea."

I agree with the argument put forward on behalf of the defendants, that the voyage for the purpose of this exception is not to be taken as ended, and the discharge of the cargo and the incidents relating to the discharge of the cargo, all ordinary incidents, are to be taken as done in the ordinary course of the voyage. But there is a fact here which tends to complicate matters.

Even assuming that the act, neglect or default which caused this damage had been that of the chief engineer alone, I doubt if the damage would be within the exception. I doubt if it would be a damage properly said to be caused "in the navigation of the ship in the ordinary course of the voyage."

The removal of the bilge-pump in question was done not for any purpose of the voyage in question, and was not done by any of the crew of the ship. It was done for the purpose of preparing the ship to perform the future voyage, and was done by engineers employed from the shore. The operation of removing the bilge-pump was not, I think, in the ordinary course of the voyage. But I do not decide the case upon that ground, because, having heard the evidence which has been given and into which I do not propose to enter at length, I find as a fact that the damage was occasioned by the joint negligence of Rait & Gardiner and of the chief engineer. [The learned judge then examined the facts shortly, and gave judgment for the plaintiffs.]

The defendants appealed.

Barnes, Q.C., and *Walton*, for the defendants. The exception in the charterparty is sufficient to discharge the defendants from

1890

THE ACCOMAC.

liability. The voyage was not completed till the whole cargo was discharged: *Bruce* v. *Nicolopulo* (1); *Barker* v. *McAndrew* (2). The ship is actually in process of being navigated till the cargo is discharged: *Lawrie* v. *Douglas.* (3) The opening of the sea-cock to fill the tanks was an act of navigation necessary to enable the vessel safely to discharge her cargo; for any act relating to the management of the ship is one of navigation. [They also referred to *Carmichael* v. *Liverpool Sailing Ship &c. Association* (4); *Canada Shipping Co.* v. *British Shipowners &c. Association* (5); *Good* v. *London Steamship Owners Association* (6); and argued that there was in fact no negligence on the part of the workmen employed to repair the pump.]

Hollams (*Finlay, Q.C.,* with him), for the plaintiffs. The exception is not applicable, and the defendants are therefore liable. The damage was not occasioned solely by the negligence of the crew; it did not occur in the navigation of the ship or in the ordinary course of the voyage. The actual means by which the water was enabled to come in, viz., the absence of any stoppage to the pipe, was the cause of the damage. *Lawrie* v. *Douglas* (3) has no application to this case, for the facts were different.

Walton, in reply.

LORD ESHER, M.R. What may be called the charterparty voyage of this vessel was not ended when the occurrence which has given rise to this action occurred; and the shipowner was therefore still liable for many things. But the question to be decided here is, what is the meaning of the exception in the charterparty; and next, is this case within it? When the words are read, they clearly refer to a particular matter, namely, navigation of the ship during a particular time, namely, the voyage. It is equally clear that negligence on the part of the chief engineer and on the part of the workmen employed to make some repairs has been established. But what occurred cannot be negligence in navigation when the ship at the time was not being navigated. She was not then voyaging, so to speak, or sailing. She was finally and intentionally moored in dock, and

(1) 11 Ex. 129.
(2) 34 L. J. (C.P.) 191.
(3) 15 M. & W. 746.
(4) 19 Q. B. D. 242.
(5) 23 Q. B. D. 342.
(6) Law Rep. 6 C. P. 563.

she was to remain there till her cargo was taken out of her. It cannot, therefore, be said that she was being navigated or was on a voyage within the ordinary meaning of the words. Neither do I think that *Lawrie* v. *Douglas* (1) touches the present point; indeed, it is impossible to say whether I can agree with that decision at all without knowing the reasons on which it was based. The damage was caused, as Butt, J., correctly states, by two combined acts of negligence of the chief engineer and of the workmen from the shore. As regards the latter, it is impossible to say that they were in any sense engaged in the navigation of the ship, and therefore the exception relied on by the defendants does not apply, and the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. No one accustomed to the ordinary and accepted meaning of our language could without straining these words make the exception applicable to the facts of this case. As to *Lawrie* v. *Douglas* (1), the ship had never in that case been properly moored.

BOWEN, L.J. I am of the same opinion. I will assume that the negligent act was that of the chief engineer alone. Was it, then, negligence during the voyage? During the charterparty voyage, perhaps, yes. But in ordinary language the ship was not being then navigated, and the voyage was over.

Appeal dismissed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) 15 M. & W. 746.

E. S. R.

1890
June 17.

IN THE GOODS OF CRAWFORD.

Administration—Testamentary Appointment—New Zealand Probate—Confirmation of Appointment in Will—Omission from Probate—Limited Grant of Administration refused.

The testator, whose domicil of origin was Scotch, executed a testamentary appointment while on a visit to this country, in the exercise of a power contained in his marriage settlement. He afterwards acquired a domicil in New Zealand, and there duly executed a will in which he referred to this testamentary appointment and confirmed it. The executors named in the will obtained probate of it in New Zealand; but no mention of the testamentary appointment was made in the probate. The registrar of the English Court refused to pass an exemplification of the probate on the ground that the testamentary appointment was not referred to in it. The appointee then moved for a grant of limited administration with the testamentary appointment annexed:—

Held, that the application must be refused, the proper course being for the executor to apply to the New Zealand Court for the grant of a fresh probate including the testamentary appointment.

APPLICATION for a limited grant of administration, with a testamentary appointment annexed, to the estate of J. C. Crawford, who died in 1889.

J. C. Crawford was born in Lanarkshire in 1817, and in 1843 was married to Sophia Whitley Deane Dundas. By an indenture of settlement made in contemplation of the marriage and dated November 28, 1843, two sums of £4493 6*s.* 9*d.* and £506 13*s.* 3*d.* and a policy for £6000 in the Crown Life Assurance Society were settled upon trust to pay and divide the same after the death of the survivor. A power of appointment was given to both husband and wife, and in default of such appointment the funds were to go to the children of the marriage in equal shares. No joint appointment was made, and Mrs. Crawford died in 1852. On June 23, 1873, Mr. Crawford, in exercise of the power conferred on him, executed a deed poll whereby he directed one half of the trust funds to be thenceforth vested in his daughter Janet Crawford, afterwards Mrs. Willis, the present applicant. He afterwards went to New Zealand and acquired a domicil there; and on April 5, 1880, while on a visit to this country, by virtue of the power contained in the marriage settlement, he executed a testamentary appointment which recited the deed poll of 1873, and

directed that the residue of the fund should after his decease be held on trust, and that the trustees should thereout set aside a sum of £500 for his son John Dundas Crawford, and should stand possessed of the remainder of the funds and policy moneys and securities upon trust for his daughter Mrs. Willis absolutely.

In 1888 he executed, in New Zealand, a will revoking all wills, codicils, and testamentary instruments theretofore made by him, and declaring this to be his last will and testament. The second clause of the will was as follows: "I confirm a testamentary appointment dated the fifth day of April, 1880, and made by me in exercise of a power in that behalf contained in an indenture of settlement dated the 28th day of November, 1843, which settlement I confirm." The deceased appointed four executors of his said will, all of whom were resident in New Zealand.

He came to this country in 1888 for the benefit of his health, and died in London in 1889.

The executors proved the will in New Zealand in due course, and sent over an exemplification of the probate, which was duly sealed by the Scotch Court. Upon application being made in England the registrar of this court refused to allow it to pass, on the ground that the probate contained no reference to the testamentary appointment executed by the deceased in 1880. The attorney for the executors declined to take any step to include the said testamentary appointment in the probate.

C. A. Middleton, for Mrs. Willis, now moved the Court that administration with the testamentary appointment annexed, limited to the trust funds comprised in the testamentary appointment, but no further or otherwise, be granted to the applicant as the appointee of the residue of the trust funds comprised therein, and for such further or other order as to the Court might seem just. The executors are represented here, and do not oppose the application. If the grant is now made in the form asked for, the attorney for the executors could then take a grant to the rest of the property.

[THE PRESIDENT. I do not see my way at present. It may be that a mistake has been made in New Zealand. The two documents may have been admitted to probate in that country.]

1890

IN THE GOODS OF CRAWFORD.

There is this difficulty. The testamentary appointment would be valid if in conformity with the English law, and there appears to be a distinction between it and the will, for the latter would have to be valid by the law of New Zealand, and no inquiry could take place in the New Zealand Courts as to the validity of the appointment. But inasmuch as the testamentary paper is confirmed by the will and mentioned in the second paragraph it would seem that the practice in issuing probates in New Zealand differs from that prevailing in this Court. [He referred to *Tatnall* v. *Hankey* (1) and *In the Goods of Alexander*. (2)]

B. Deane, for the executors.

THE PRESIDENT. I went rather fully into the matter myself in *In the Goods of Astor*. (3) I cannot doubt that when the question now before me is pointed out to the New Zealand Court they will set it right. Application must be made to that Court. It is obvious, on grounds of public policy, that the probate which purports to contain the will should contain the whole, and not a part only, of the testamentary papers of the deceased. The probate should always include all the documents that go to make up the will of the deceased person. In the case of *The Goods of Harris* (4) the papers were sent back here by the Court of Tasmania. That is the converse of what must be done in the present case. The exemplification of the probate and the original appointment may be handed out to the attorney for the executors, so that the latter may apply to the New Zealand Court to revoke the probate, and to include in a fresh probate the said testamentary appointment. The present application is refused.

Solicitors for applicant: *Young, Jones, & Co.*

Solicitor for attorney to executors: *H. Hope Shakespear.*

(1) 2 Moo. P. C. 342.
(2) 29 L. J. (P. & M.) 93.
(3) 1 P. D. 150.
(4) Law Rep. 2 P. & D. 83.

W. L.

IN THE GOODS OF TIMOTHY EVANS.

1890
July 15.

Testamentary Suit—Application of a Creditor not party to the Suit for the appointment of an Administrator—20 & 21 Vict. c. 77, s. 70.

Where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the Chancery Division in which a receiver had been appointed, this Court, on the application of a creditor not a party to the testamentary suit, appointed an administrator, pendente lite.

TIMOTHY EVANS, late of Rhashill, in the county of Pembroke, died September 10, 1880, leaving a will, by which he bequeathed all his property, real and personal, to his wife, Hannah Evans, absolutely, and appointed her his executrix.

The will was disputed by the heir-at-law, and an action was commenced in this Court to test the validity of the will. The action was still pending, but notice of trial had been withdrawn.

Walter Shute was a creditor of the estate of the deceased to the amount of 31*l.* 17*s.* 9*d.*, and had applied to his widow for payment; but in consequence of there being no legal personal representative of the estate he was unable to obtain payment. Mr. Shute then commenced proceedings in the Chancery Division for the administration of the estate; and on April 15, 1885, Thomas Johns was appointed receiver, and had received funds on account of the estate to the amount of 120*l.*

B. Deane now moved that Mr. Johns be appointed administrator of the testator's estate, pendente lite, with directions to pay Mr. Shute's debt, and cited *Tichborne* v. *Tichborne.* (1)

THE PRESIDENT. I think it is a reasonable request that Mr. Johns should be appointed administrator, pendente lite, and I make an order to that effect; but I cannot give directions that he shall pay the debt.

On July 21, on an affidavit that Mr. Johns had paid the money in his hands into Court, the President varied the order for his appointment, and referred it to the registrar to appoint some other person in his place.

Solicitors: *Torr, Janeways, Gribble, & Oddie.*

(1) Law Rep. 1 P. & D. 730.

W. L.

1890
Aug. 4.

TYLER AND ANOTHER *v.* MERCHANT TAYLORS' COMPANY.

Probate—Will and Codicil—Interlineations and Alterations made before the execution of Codicil.

Interlineations and alterations in a will admitted to probate where it was proved that they had been inserted before the date of the execution of a codicil to the will.

THE plaintiffs, the Rev. William Tyler and Mr. Charles Tyler, propounded as executors the last will, with interlineations and alterations, dated April 18, 1882, and a codicil, dated March 17, 1890, of Sir James Tyler, deceased, late of Pine House, Holloway, in the county of Middlesex.

The defendants, the Merchant Taylors' Company, pleaded that the interlineations and alterations now appearing on the face of the will were not inserted therein before the execution of the will.

The case was tried before the President without a jury.

Inderwick, Q.C. (*Searle*, with him), for the plaintiffs.

B. Deane, for the defendants.

The testator died April 5, 1890. By his will he left legacies to the Merchant Taylors' Company of 42,000*l.*, subject to a rent-charge of 800*l.* a year for life to his brother, the Rev. William Tyler, and another rent-charge of 50*l.* a year to Miss Dempster of Eastbourne, and with the expression of a desire that the company would use the money for the benefit of convalescent homes and ladies' homes in particular. He also bequeathed legacies of 42,000*l.* each to the British and Foreign Bible Society and the London Missionary Society, subject to various life rent-charges, as well as smaller legacies to other charitable societies, and to servants. By the codicil he appointed the Rev. W. Tyler his residuary legatee, and bequeathed certain freehold premises to his two brothers, his executors. The material interlineation was the insertion of the words "New Three per Cents." over the legacy of 42,000*l.* to the Merchant Taylors' Company, and it appeared that at the time of his death the testator had no "New Three per Cents.," having sold out the 42,000*l.* which he had

held, and invested the proceeds in "Indian Threes." There was also an interlineation at the end of the will bequeathing all "his books, pictures, and prints to the Merchant Taylors' Company to keep what they wish, the rest to go to the Ladies' Home, Bognor"; and across the foot of the will, below the signature of the testator, were written the words, "I give to Amy and Ada 100*l.* each." The other alterations were merely verbal and of no importance. The body of the will and the interlineations were all in the testator's handwriting.

The Rev. William Tyler, D.D., one of the executors and the residuary legatee, was called, and stated that about a fortnight before his death the testator gave him his will and told him to read it over. At that time he noticed that the interlineations and alterations, including the pencil note at the foot of the will, were inserted in it, and the will was in the same state as it now appeared. He took it back to his brother, and having noticed that the residue was undisposed of, he asked him who was to be his residuary legatee. His brother replied, "You, of course; who else can be?" and directed him to prepare a codicil to that effect. The codicil was duly executed on the next day.

M. Michael Sefi, of Threadneedle Street, the testator's stockbroker, deposed that on March 9, 1888, under testator's instructions, he sold for him 42,000*l.* New Three per Cents. and purchased India Three per Cent. Stock with the proceeds. He further stated that all the New Three per Cents. were redeemed by the Government in the autumn of 1888, and that consequently there was no such stock in existence at the time of the execution of the codicil.

THE PRESIDENT. The evidence clearly shews that the interlineations and alterations were inserted in the will at the time of the execution of the codicil, and are therefore confirmed by it, and are entitled to probate. I therefore pronounce for the will and codicil with the interlineations, including the pencil writing across the foot of the will.

Solicitors for plaintiff: *Gard, Hall, & Rook.*
Solicitor for defendants: *A. G. Parson.*

W. L.

1890
May 1;
July 15.

LONG v. LONG AND JOHNSON.

Divorce—Petition by Husband—No Appearance by Respondent—Verdict of Jury against co-Respondent—Examination of Respondent by the Court—Dismissal of Petition against her—Co-Respondent condemned in Damages and Costs.

In a petition by the husband for dissolution of the marriage on the ground of adultery, the respondent filed no answer and did not appear. The jury found a verdict against the co-respondent, and assessed the damages against him at 50*l.* The Court, not being satisfied with the evidence against the wife, directed her to be summoned, and having heard her evidence, on which she was cross-examined, to the effect that she had been forced, came to the conclusion that the charge of adultery had not been established against her, and dismissed the petition as against her, but gave judgment against the co-respondent for the damages with costs.

THIS was a petition by the husband for the dissolution of the marriage on the ground of his wife's adultery with the co-respondent.

The respondent entered no appearance; but the co-respondent pleaded a denial of the adultery, and further pleaded that the petitioner and respondent were acting in collusion.

The case against the co-respondent was heard before Butt, J., and a common jury.

C. E. Jones, for the petitioner.

B. Deane, for the co-respondent.

At the trial, in addition to other evidence, the petitioner stated, that in consequence of information which reached him he taxed his wife with having committed adultery, and, after denying the fact several times, she at last admitted that illicit intercourse had taken place between her and the co-respondent, but asserted that she was not a consenting party. Subsequently she signed a written statement to the same effect.

The jury found that the co-respondent had committed adultery with the respondent, and assessed the damages against him at 50*l.*

BUTT, J. The issue whether the respondent has committed adultery is for me to decide, and at present I am not satisfied with the evidence. I shall direct that she be summoned to attend here, when, if she chooses, she can make a statement.

On a subsequent day the respondent attended in Court and

expressed her desire to give evidence. She admitted that illicit intercourse had taken place between her and the co-respondent on the occasion charged, but stated that she had been forced, and that she was not a consenting party.

In cross-examination by C. E. Jones, for the petitioner, she admitted that for some time she denied the fact to her husband because she was afraid to confess.

Cur. adv. vult.

1890. July 15. BUTT, J. This was a case which was heard in the first instance before myself and a common jury on May 1st, the only issue for the jury being as to the adultery of the co-respondent. The jury found the issue against the co-respondent, and assessed the damages against him at 50*l.* The issue against the respondent being for me, I was not satisfied with the evidence, and I directed that she should be summoned to attend on a future day. She did attend on May 20, and I told her that she was not bound to answer any of the questions which I proposed to put to her, but that if she wished to make any statement she could do so. Thereupon she did give her evidence on oath, and she was cross-examined by some of the parties to the suit. She appeared to me weak mentally and physically. I arrived at the conclusion that the charge was not established against her; and I therefore refused to grant the dissolution of marriage prayed for. A question then arose as to the form of the judgment or decree, and I said I would see what form was usual or necessary. Upon making inquiries in the registry, and upon looking at the minutes of a case in which similar circumstances occurred, I came to the conclusion that the right way would be to dismiss the suit as against the wife, and to give judgment against the co-respondent for the damages found by the jury, with costs. That accordingly is the order I now make.

Solicitors for petitioner: *Speechly, Mumford & Co.*
Solicitors for co-respondent: *Lovell, Son, & Pitfield.*

W. L.

END OF VOL. XV.

The Mode of Citation of the Volumes of the LAW REPORTS commencing January 1, 1891, will be as follows :—

In the First Series,
[1891] 1 Ch. [1891] 2 Ch. [1891] 3 Ch.

In the Second Series,
[1891] 1 Q. B. [1891] 2 Q. B. [1891] P.

In the Third Series,
[1891] A. C.

INDEX.

ECCLESIASTICAL.

BURIAL—Reserved grave space—Order in council closing churchyard except to members of families of parishioners—Petition by non-parishioner member of such a family *See* ECCLESIASTICAL LAW. 2. [168

CLERGY — Misconduct of clerk — Conviction before justices — Scandal — Suspension ab officio - - - - 81
See ECCLESIASTICAL LAW.

ECCLESIASTICAL LAW—*Misconduct of Clerk—Conviction before Justices—Scandal—Suspension ab officio.*] In a suit instituted in the Court of Arches against a clerk in orders, the articles alleged that he had been convicted before justices in petty sessions of having been drunk and riotous in a public place, and prayed that he might be punished for the scandal caused thereby. The respondent, by his plea, denied that he had been drunk and riotous, or that the conviction had caused scandal, alleged that it had been obtained

ECCLESIASTICAL LAW—*continued.*
by perjured evidence, and demanded a full inquiry into the facts. On motion to strike out this plea :—*Held*, that the plea was no answer to the articles and could not be admitted, for the Court had jurisdiction to suspend a clerk ab officio on account of the scandal caused by the conviction without considering whether the offence charged had been actually committed. BOROUGH *v.* COLLINS - - - - - - - 81

2. —— *Faculty for Burial—Reserved Grave Space—Order in Council closing Churchyard except to Members of Families of Parishioners—Petition by Non-Parishioner Member of such a Family.*] By an Order in Council a churchyard was closed except as to burials in reserved grave spaces allotted to members of the families of parishioners :—*Held* (reversing the decree of the Consistory Court of Chichester), that a faculty for the reservation of a space in the churchyard for exclusive burial could be granted to a living non-parishioner, member of the family of a parishioner. IN RE SARGENT - - - 168

PROBATE.

ADMINISTRATION—*Pauper Lunatic—Grant to Nominee of Guardians.*] The husband of a deceased intestate was a lunatic pauper confined in a county asylum at the charge of the guardians of his union. Notice having been given to his next of kin and no appearance entered, the Court made a grant to the guardians for the use and benefit of the lunatic, and limited to such time as he should remain insane. IN THE GOODS OF ECCLES - - - - - - 1

2. —— *Administration de bonis non—Administrator absconded—Revocation of Grant—New Grant made.*] An administrator, who was also one of the residuary legatees, having partly administered the estate, left his home, and though several years had elapsed no trace of him could

ADMINISTRATION—*continued.*
be discovered. The Court revoked the grant made to him, and made a fresh grant de bonis non to another of the residuary legatees. IN THE GOODS OF COVELL - - - - 8

3. —— *Grant to Committee of Lunatic—Sureties to Administration Bond.*] The committee of a lunatic having applied for a grant of administration for her use and benefit, it appeared that the estate to be administered consisted of 12,000*l.*, of which all but 850*l.* had been paid into the Chancery Division, and the balance would shortly be paid in :—*Held*, that sureties for the administration bond could not be dispensed with, but that it would be enough if the sureties entered into a bond for double the value of the estate

ADMINISTRATION—*continued.*
after deducting the amount paid into the Chancery Division. In the Goods of Morris - 9

4. —— *Presumption of Death—Person alleged to be deceased not the Person whose Estate was to be administered.*] Upon application by the next of kin of a married woman for a grant of administration to her estate, the Court was asked to allow an affidavit to be made of the death of her husband, on the ground that his death might be presumed from the lapse of time since he was last heard of:—*Held*, that having regard to the fact that the person whose death was to be presumed was not the intestate, such leave should not be given, but that administration might be granted if the applicant was prepared to make an affidavit that the intestate had died a widow. In the Goods of Amelia Clark - - - - 10

5. —— *Grant to Official Receiver in Bankruptcy—Sureties to Bond dispensed with.*] Where a grant of administration to the estate of a deceased intestate was made to the chief official receiver in bankruptcy, the Court, while requiring him to give the administration bond, dispensed with the usual sureties. In the Goods of Cope [107

6. —— *No known Relatives of Deceased—Grant ad colligendum to a Creditor.*] A woman having died intestate without any known relatives, and it being impossible to ascertain whether she had ever been married, or, if married, whether her husband survived her, the Court made a grant ad colligendum to an unsecured creditor, and accepted the affidavit of his solicitor that "he was informed and verily believed that she died a widow without any known relations, and intestate." In the Goods of Anne Ashley - 120

7. —— *Testamentary Appointment — New Zealand Probate—Confirmation of Appointment in Will—Omission from Probate—Limited Grant of Administration refused.*] The testator, whose domicil of origin was Scotch, executed a testamentary appointment while on a visit to this country, in the exercise of a power contained in his marriage settlement. He afterwards acquired a domicil in New Zealand, and there duly executed a will in which he referred to this testamentary appointment and confirmed it. The executors named in the will obtained probate of it in New Zealand; but no mention of the testamentary appointment was made in the probate. The registrar of the English Court refused to pass an exemplification of the probate on the ground that the testamentary appointment was not referred to in it. The appointee then moved for a grant of limited administration with the testamentary appointment annexed:—*Held*, that the application must be refused, the proper course being for the executor to apply to the New Zealand Court for the grant of a fresh probate including the testamentary appointment. In the Goods of Crawford - - - - - - 212

8. —— *Testamentary Suit—Application of a Creditor not party to the Suit for the appointment of an Administrator—20 & 21 Vict. c. 77, s. 70.*] Where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the Chancery Division in which a receiver had been appointed, this Court, on the application of a creditor not a party to the testamentary suit, appointed an administrator, pendente lite. In the Goods of Timothy Evans - 215

—— Refusal to grant letters of—Appeal—Non-contentious business - - 132
See Appeal.

APPEAL—*Non-contentious Business—Refusal to Grant Letters of Administration—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 2.] A person claiming to be a creditor of an intestate applied for letters of administration, having cited the next of kin, who did not appear. The judge refused the grant, holding that the applicant was not a creditor of the intestate. The applicant appealed:—*Held*, that, whether the application was contentious or non-contentious business, as to which the Court gave no opinion, there was, under s. 19 of the Judicature Act, 1873, an appeal from the judge's decision to the Court of Appeal. In re Clook - - - - - C. A. 132

ATTESTING WITNESS—Signature of legatee written under attestation clause—Omission of name in probate - - 2
See Will.

BOND—Administration—Sureties dispensed with
See Administration. 5. [107

CASES:—
—— *Scott* v. *Attorney-General* (11 P. D. 128) distinguished - - - - 152
See Will. 9.

CONFLICT OF LAWS—Two wills—Property in England and Switzerland disposed of separately - - - - 185
See Will. 12.

CREDITOR—No known relatives of intestate—Grant ad colligendum to a creditor 120
See Administration.

DEATH—Presumption—Person alleged to be dead not the person whose estate is to be administered - - - 10
See Administration. 4.

DIVORCE—Indian divorce—Marriage in England within six months of final decree 152
See Will. 9.

DOMICIL — Testamentary appointment — New Zealand probate—Confirmation of appointment in will — Omission from probate - - - - 212
See Administration. 7.

EVIDENCE—Lost will—Contents proved by oral evidence - - - - 170
See Will. 11.

EXECUTOR—Will—Executors according to tenor
See Will. 3. [22

INDIA—Indian divorce—Marriage of parties in England within six months of final decree - - - - 152
See Will. 9.

INTERLINEATIONS—Interlineations and alterations made before the execution of codicil - - - - 216
See Will. 13.

LEGITIMACY, DECLARATION OF—*Writ of Summons—Claim for Probate and declaration of Legitimacy included in the same Writ.*] In an action for probate the Court refused to allow the plaintiff to include in the writ of summons a prayer for a declaration of legitimacy. Warter *v.* Warter [35

LUNATIC—Pauper—Grant of administration to guardians of poor-law union - 1
See Administration.

—— Administration — Grant to committee of lunatic—Sureties to administration bond
See Administration. 3. [9

MARRIED WOMAN—Will disposing of realty only — Power of appointment — Realty vested in testatrix—Administration with will annexed - - - 149
See Will. 8.

OFFICIAL RECEIVER—Bankruptcy — Sureties to bond dispensed with - - 107
See Administration. 5.

PRESUMPTION—Death—Person alleged to be dead not the person whose estate is to be administered - - - 10
See Administration. 4.

RATIFICATION—Destruction of will—Destruction without authority of testator—Revocation - - - - 20
See Will. 2.

REVOCATION—Grant of administration — Absconding of administrator—New grant 8
See Administration. 2.

—— Will—Destruction without authority of testator—Subsequent ratification - 20
See Will. 2.

—— Indian divorce—Marriage of parties in England within six months of final decree
See Will. 9. [152

STATUTES:—
1 Vict. c. 26, s. 18 - - - - 111
See Will. 6.
—— —— s. 20 - - - - 20
See Will. 2.
20 & 21 Vict. c. 77, s. 70 - - - 215
See Administration. 8.
—— —— s. 2 - - - - 132
See Appeal.
36 & 37 Vict. c. 66, s. 19 - - - 132
See Appeal.

TESTAMENTARY APPOINTMENT—Ante-nuptial settlement—Power of appointment exercised by revocable deeds-poll 105
See Will. 4.

TESTAMENTARY APPOINTMENT—*continued.*
—— Execution of power of appointment—Subsequent marriage—Revocation — Limited probate - - - - 111
See Will. 6.

—— New Zealand probate—Confirmation of appointment in will—Omission from probate—Limited grant of administration refused - - - - 212
See Administration. 7.

TESTAMENTARY DOCUMENT — Intention expressed on the face of document—Testamentary paper executed not as legal will, but as a guide - - 109
See Will. 5.

—— Deed-poll—Intention—Extrinsic evidence
See Will. 10. [156

TESTAMENTARY SUIT—Application of a creditor not a party to the suit for the appointment of an administrator - 215
See Administration. 8.

WILL—*Signature of Legatee written under Attestation Clause—Omission of Name in Probate.*] After a will had been executed, and duly attested by two attesting witnesses, the wife of the testator, who was also an executor and took a life interest in the whole estate, signed her name to the will by the testator's request, not with the object of attesting it, but in order to verify its contents.—The Court granted an application for probate of the will, omitting the signature of the wife upon proof that notice of the application had been served upon a guardian appointed by the Court to represent children who had a reversionary interest in the will and were minors, and that no appearance had been entered. In the Goods of E. J. Smith - - - 2

2. —— *Revocation—Destruction without Authority of Testator—Subsequent Ratification — Wills Act (1 Vict. c. 26), s. 20.*] The will of a testatrix was destroyed in her presence, but without her consent or authority, by a relative. Subsequently the testatrix, though pressed to do so, refused to make a new will, saying that she could not bring her mind to it, and that it must remain as it was:—*Held*, that there was no sufficient evidence of a subsequent ratification of the destruction of the will so as to constitute it an act done by the direction and by the authority of the testatrix, and that probate might be granted of the will as contained in an affidavit of the executor.—*Quære*, whether, where a will has been destroyed not only without the authority of a testatrix, but against her wish, any subsequent ratification of the act of destruction will make it a revocation within s. 20 of the Wills Act. Mills *v.* Millward - - - - - 20

3. —— *Executors according to the Tenor.*] A testator in his will did not specifically appoint any executor but nominated four persons to act as his trustees, and bequeathed to them his residuary estate with power to receive any sums due to the residue, and to give a discharge for the same. The will contained directions to "my executors" as to the payment of his debts and as to the manner in which they were to deal with the residue and other portions of the estate; and generally it

WILL—*continued.*

appeared that the testator had used the terms "trustees" and "executors" indifferently as referring to the same persons:—*Held*, that the trustees were executors according to the tenor, and entitled to probate. In the Goods of the Earl of Leven and Melville - - 22

4. —— *Ante-nuptial Settlement—Power of Appointment exercised by revocable Deeds-Poll—Probate.*] A testatrix, in contemplation of her marriage, settled her property upon such trusts as she should by revocable deed or by will appoint. In 1884 she duly executed a will which did not expressly include this property, and in 1887 and 1889 she executed two revocable deeds-poll, which were duly attested by two witnesses, whereby she appointed the settled property upon certain trusts from and after her decease:—*Held*, that the deeds were testamentary instruments and entitled to probate, as, together with the will of 1884, constituting the last will of the deceased. Milnes *v.* Foden - - - - - - 105

5. —— *Will or Codicil—Intention expressed on the face of Document—Testamentary Paper executed "not as Legal Will, but as a Guide."*] A testatrix having duly executed a will, subsequently executed a paper drawn up by her husband with her full concurrence, which was headed "This is not meant as a legal will, but as guide":—*Held*, that the paper was not a valid testamentary document, and that probate must be refused. Ferguson-Davie *v.* Ferguson-Davie [109

6. —— *Execution of Power of Appointment—Subsequent Marriage—Revocation—Wills Act* (1 *Vict. c.* 26), *s.* 18—*Limited Probate.*] A testator by his will bequeathed all the real and personal estate to which he might be entitled at the time of his death, or over which he had power of appointment, to A. B., and appointed her his sole executrix. He subsequently married A. B., and died without making another will.—The property over which he had power of appointment under the will of his mother if he had not exercised it would have been divided among his brother and sisters:—*Held*, that so much of the will as was in execution of the power of appointment came within the exception of s. 18 of the Wills Act (1 Vict. c. 26) and was not revoked by marriage, and that administration with the will annexed might be granted to the widow, limited to the property over which the testator had a power of appointment. In the Goods of G. B. Russell [111

7. —— *Two Wills—Estate in England and South Africa—Independent Disposition.*] A testator died possessed of property in England and South Africa. He executed two wills, one disposing of his English estate and the other of his South African estate, each purporting to be independent of the other, and intended to have no operation on the property disposed of by the other:—*Held*, that probate might be granted of the English will without requiring the South African will to be brought in, on an affidavit being filed exhibiting an attested copy of it, and a statement being inserted in the probate that such affidavit had been filed. In the Goods of Callaway - - - - - - 147

WILL—*continued.*

8. —— *Will of Married Woman—Will disposing of Realty only—Power of Appointment—Realty vested in Testatrix—Outstanding Grant of Administration to Personalty.*] The testatrix, a married woman, made a will disposing of realty only, and appointing three executors. The testatrix under the provisions of a deed had a power of appointment over the realty, and in default of such appointment it was declared that the realty should be vested in her for her sole and separate use. She never exercised the power; and after her death her husband took out letters of administration to her personal estate on the ground that she had died intestate except as to realty:—*Held*, that the testatrix must be regarded as in the position of a feme sole with regard to the real estate, and that the will therefore might be admitted to probate; but the Court declined to make a grant until the existing grant of administration had been revoked. In the Goods of Hornbuckle [149

9. —— *Revocation by Marriage—Indian Divorce—Marriage of Parties in England within Six Months of Final Decree—Indian Divorce Act,* 1869, *No.* 4, *s.* 57.] The prohibition contained in the 57th section of the Indian Divorce Act of 1869, No. 4, against the remarriage of either party within six months of the date of the final decree is an integral part of the proceeding, and a condition which must be fulfilled before the parties can contract a fresh marriage, and they cannot evade it by obtaining a domicil in another country.—A respondent and a co-respondent in a divorce suit in India, in which a decree absolute was pronounced on November 27, 1879, came to this country and were married on February 3, 1880. On February 6 the co-respondent duly executed a will by which he bequeathed all his property to his "reputed wife." On April 2, 1880, the parties went through a second form of marriage:—*Held*, that the first marriage, having been celebrated within six months from the date of the final decree of divorce, was invalid, and that the will was revoked by the subsequent marriage.—*Scott* v. *Attorney-General* (11 P. D. 128) distinguished. Warter *v.* Warter - - 152

10. —— *Deed-poll — Intention — Extrinsic Evidence.*] Probate granted of a deed-poll duly executed and attested by two witnesses, but containing no reference to the death of the testatrix, and extrinsic evidence admitted to shew that she intended it to operate as a will. In the Goods of Slinn - - - - - - 156

11. —— *Lost Will—Contents proved by Oral Evidence.*] W. K. died in 1877. At his funeral his widow produced a document, which she stated to be the will of W. K. It gave her a life interest in his property, which consisted of a freehold house and land, and divided it after her death among the sons and daughters of the testator. The document was subscribed with three names, one of which purported to be the name of W. K., written in his own handwriting; the other two names were those of friends of the testator. At the funeral the defendant, who was the eldest son of W. K., said that the document was no will of his father's, and that the signature was not in his writing. But he took no steps to assert his right

WILL—*continued.*

as heir-at-law, and the widow continued to occupy the house and land until she died in July, 1885, without, however, taking any step to prove or establish the will she had so produced. After her death the will could not be found; and the plaintiff, who was one of the daughters of the marriage, propounded the alleged will, and pleaded that although it was lost the Court ought to grant probate of it. Both the persons whose names were subscribed to the lost document were dead. No copy or draft of such document could be found, and it was not proved that it bore any date or contained any attestation clause; but its existence and contents, and the handwriting of the testator, and that of one of the two friends of his who had subscribed it, were proved to the satisfaction of Butt, J., who granted probate of the will.—On appeal, *held*, by Lindley and Lopes, L.JJ., Cotton, L.J., dissenting, that Butt, J., was justified in presuming that the lost will was duly executed, and in granting probate accordingly. Harris *v.* Knight - - - C. A. 170

12. —— *Two Wills—Property in England and Switzerland disposed of separately—Probate of English Will alone granted.*] The testator executed two wills—one according to the English form, appointing executors, and disposing solely

WILL—*continued.*

of his property in this country, the other according to the Swiss form, by which no executors were appointed, which purported to be entirely independent of the English will, and which affected only property in Switzerland and Italy:—*Held*, on an affidavit being filed that if the English executors intermeddled with the Swiss estate they would come into conflict with the Swiss Court, which by the law of the country had the administration of the estate, and, on a copy of the Swiss will being filed, that probate might be granted of the English will alone. In the Goods of De la Rue - - - - 185

13. —— *Will and Codicil — Interlineations and Alterations made before the execution of Codicil.*] Interlineations and alterations in a will admitted to probate where it was proved that they had been inserted before the date of the execution of a codicil to the will. Tyler *v.* Merchant Taylors' Company - - - - 216

—— Signature of legatee written under attestation clause—Omission of name in probate - - - - - 2
See Will.

WRIT OF SUMMONS — Action for probate — Prayer for declaration of legitimacy 35
See Legitimacy, Declaration of.

DIVORCE.

ADULTERY—*Petition by Husband—No Appearance by Respondent—Verdict of Jury against co-Respondent—Examination of Respondent by the Court—Dismissal of Petition against her — Co-Respondent condemned in Damages and Costs.*] In a petition by the husband for dissolution of the marriage on the ground of adultery, the respondent filed no answer and did not appear. The jury found a verdict against the co-respondent, and assessed the damages against him at 50*l.* The Court, not being satisfied with the evidence against the wife, directed her to be summoned, and having heard her evidence, on which she was cross-examined, to the effect that she had been forced, came to the conclusion that the charge of adultery had not been established against her, and dismissed the petition as against her, but gave judgment against the co-respondent for the damages with costs. Long *v.* Long and Johnson [218

ALIMONY — *Cross-petitions—Alimony pendente lite—Order for continuation of Alimony after two Trials in neither of which had a verdict of Adultery been returned against the Wife—Fi. fa. refused.*] On the trial of cross-petitions presented by husband and wife, the jury found that the husband had, but the wife had not, committed adultery, and a decree nisi for dissolution of the marriage was accordingly pronounced by the Court. The Queen's Proctor having intervened, a second trial took place, when the jury found that both parties had acted in collusion to suppress material facts, but they could not agree as to the charge of adultery, brought by the Queen's Proctor against the wife. The Court rescinded

ALIMONY—*continued.*

the decree nisi. The wife appealed, and the husband had ceased to pay the alimony:—*Held*, that a writ of fi. fa. to enforce the arrears of alimony could not be granted, but that the order for payment of the alimony ought to be renewed until further notice. Butler *v.* Butler. Butler *v.* Butler and Burnham - - 13

APPEAL — *Jurisdiction — Practice — Attachment for Contempt of Court—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47—*Criminal Matter.*] An application by a party to a civil action for an attachment against a person not a party to the action, for contempt of Court in the publication of comments calculated to prejudice the fair trial of the action, is a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873 (36 & 37 Vict. c. 66); and no appeal from an order made upon such an application can be brought to the Court of Appeal.—*Reg.* v. *Barnardo* (23 Q. B. D. 305) distinguished. O'Shea *v.* O'Shea and Parnell - - C. A. 59

—— Order for continuation of alimony—Intervention of Queen's Proctor—Cross-petitions - - - - - 13
See Alimony.

—— Costs—Intervention of Queen's Proctor—Wife's costs - - 32, 126
See Costs. 1, 2.

ATTACHMENT—Contempt of Court—"Criminal cause or matter"—Appeal to Court of Appeal - - - - 59
See Appeal.

ATTACHMENT—*continued.*

—— Permanent maintenance—Default in payment - - - - 115
See Maintenance. 2.

CASES:—

—— *Alexandre* v. *Alexandre* (Law Rep. 2 P. & D. 164) considered - - - 66
See Collusion.

—— *Field* v. *Field* (14 P. D. 26) followed 11, 47
See Restitution of Conjugal Rights.

—— *Reg.* v. *Barnardo* (23 Q. B. D. 305) distinguished - - - - 59
See Appeal.

CITATION, SERVICE OF—Registered Letter 24
See Practice.

COLLUSION — *Counter-Petitions—Agreement between the Parties—Queen's Proctor, Intervention of—Suppression of material Facts—Facts material to, though not sufficient to establish Counter-charge—Right to Decree Absolute—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *ss.* 30, 31 —*Matrimonial Causes Act,* 1860 (23 & 24 *Vict. c.* 144), *s.* 7.] A wife having petitioned for a divorce from her husband on the ground of his cruelty and adultery with several women, the husband presented a counter-petition on the ground of his wife's adultery. During the trial of the petitions, the husband and wife, by their respective solicitors, entered into an agreement that the wife should give evidence of cruelty to the satisfaction of the Court, and of the husband's adultery with W., one of the women charged, and that if the Court was satisfied on that evidence the decree should go, the wife should withdraw the other charges, and the husband should withdraw his petition. The wife's counsel proceeded with the trial as if the agreement had not been entered into; but the husband's counsel acted in accordance with instructions based on the agreement, and did not cross-examine the wife. The jury found that the husband had committed adultery with W. only, that he had been guilty of cruelty, and that the wife had not committed adultery.—On these findings a decree nisi was granted.—The Queen's Proctor intervened, and after a hearing at which further evidence was adduced, the judge left to the jury the questions—(1) Were material facts withheld from the knowledge of the Court? (2) Was there collusion? (3) Did the wife commit adultery?—The jury answered the two first questions in the affirmative, but were unable to agree as to the third:—*Held,* first, that under the Matrimonial Causes Act, 1857, a wife was deprived of her right to a decree, not only if she had been guilty of a matrimonial offence, but also if her petition had been presented or prosecuted in collusion with the respondent; and secondly, that an agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts, which might have been adduced on the trial in support of a counter-charge, amounted to collusion, even though the facts suppressed might not have been sufficient to establish such counter-charge. — *Alexandre* v. *Alexandre* (Law Rep. 2 P. & D. 164) considered. Butler *v.* Butler. Butler *v.* Butler and Burnham - - - - C. A. 66

COLLUSION—*continued.*

2. —— *Cross Suits—Decree Nisi granted to the Wife—Queen's Proctor's Intervention—Both Parties guilty of Collusion—Decree rescinded—Money paid into Court for the Wife's Costs ordered to be paid out to Queen's Proctor.*] At the trial of two cross-petitions for dissolution by the husband and wife, the wife, by arrangement between the parties, obtained a decree nisi, and the husband was condemned in costs. The Queen's Proctor intervened, charging both parties with collusion, and the wife with adultery. At the trial of these issues the jury found that the parties had been guilty of collusion, but disagreed as to the adultery, and the decree nisi was rescinded. The husband had paid into Court sums amounting to 140*l.* to meet the wife's costs. The Court had refused—and the Court of Appeal had confirmed this decision—to allow any part of the sum to be paid out to the wife or her solicitors. —The Court now, on application by the Queen's Proctor, ordered the whole sum of 140*l.* to be paid out to him in part payment of his costs for procuring the reversal of the decree nisi. Butler *v.* Butler. Butler *v.* Butler and Burnham - - - - - - 161

CONCEALMENT—Counter-petitions—Collusion
See Collusion. [66

CONTEMPT OF COURT — Attachment — "Criminal cause or matter" — Appeal to Court of Appeal - - - 59
See Appeal.

CO-RESPONDENT—*Wife's Confession only Evidence—Motion to dispense with co-Respondent refused—Personal Service of Citation ordered—Divorce Act,* 1858 (20 & 21 *Vict. c.* 85), *s.* 28.] In a petition by a husband for divorce, it appeared that the address and occupation of the alleged adulterer were known to the petitioner; but there was no evidence against him except the respondent's confession:—*Held,* that the petitioner could not be excused from making the adulterer a co-respondent, and that the citation must be personally served upon him as such co-respondent. Cornish *v.* Cornish - - - - 131

COSTS—*Decree Nisi—Queen's Proctor, Intervention of—Collusion—Rescission of Decree—Security for Wife's Costs—Payment out of Registry.*] A wife having obtained a decree nisi in a petition for divorce, the Queen's Proctor intervened and she was proved to have obtained the decree by collusion, to which her solicitors were parties. The petition was accordingly dismissed. The husband in the course of the proceedings had paid into the registry two sums of money to cover the wife's costs of the two proceedings:—*Held,* that under the circumstances the wife was not entitled to an order that such money should be paid out to her or her solicitors.—It is not the practice of the Court to order the husband to give security for his wife's costs incidental to an intervention of the Queen's Proctor. Butler *v.* Butler. [*See next case*] - - - 32

2. —— *Appeal—Intervention of Queen's Proctor—Wife's Costs—Divorce Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 51—*Matrimonial Causes Act,* 1878 (41 & 42 *Vict. c.* 19), *s.* 2—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 49.] Although in pro-

COSTS—*continued.*
ceedings for divorce a wife as a general rule is allowed her costs, the allowance of such costs is under the Divorce Act, 1857, s. 51, in the discretion of the Court, and there is no appeal from the refusal of the Court to order the wife's costs to be paid.—The costs occasioned to a wife by the intervention of the Queen's Proctor are also within the discretion of the Court, and if the judge in his discretion disallows them, an appeal from an order refusing them will not lie. Butler *v.* Butler - - - - - C. A. 126

DECREE NISI—Queen's Proctor, Intervention of —Collusion—Rescission of decree—Security for wife's costs—Payment out of registry - - - - 32
See Costs.

DEMAND—Restitution of conjugal rights—Written demand—Additional rules and regulations - - - 11, 47
See Restitution of Conjugal Rights. 1, 2.

DESERTION—*Husband's Adultery coupled with Desertion—Husband willing to return to Cohabitation—Decree of Judicial Separation.*] In a wife's suit for dissolution on the ground of adultery coupled with desertion the adultery was proved; and with regard to the desertion, it appeared that after twenty-one years' cohabitation it was, in August, 1886, agreed between the parties, who were then resident abroad, that the wife and the children of the marriage should come to live in England. They accordingly took lodgings at Bournemouth, and the wife pressed her husband to return with them, but he refused. She continued willing to receive him and renew cohabitation until February, 1887, when she was shewn a letter which convinced her that her husband had been carrying on an adulterous intercourse. Upon this she resolved that she never would live with him again. He wrote several letters to her offering to return to cohabitation, to which she did not reply; but her solicitors, by her direction, informed him that she would never live with him again:—*Held*, that there being no proof that the husband's offers to live again with his wife were not bonâ fide, she could not treat the separation on which she insisted as desertion by him, and that she was only entitled, therefore, to a judicial separation on the ground of adultery. Lodge *v.* Lodge - - - - 159

DIVORCE—Adultery of husband—Offer to return to cohabitation - - - 159
See Desertion.

FOREIGN LAW—Marriage between British subject and native of Japan - 76
See Marriage.

GUARDIAN—Person of unsound mind—Practice - - - - 25, 50
See Nullity. 1, 2.

HUSBAND AND WIFE—Permanent maintenance—Dum sola clause - - 4
See Maintenance.

HUSBAND AND WIFE—*continued.*
—— Divorce—Settlements—Order for variation —Refusal to make further variation—Subsequent circumstances - 29
See Settlements.

INTERVENTION—Queen's Proctor—Rescission of decree nisi—Security for wife's costs - - - - 32, 126
See Costs. 1, 2.

LUNATIC—Nullity—Alleged insanity of petitioner—Guardian ad litem - 25, 50
See Nullity. 1, 2.

MAINTENANCE—*Dum sola Clause—20 & 21 Vict. c 85, s. 32.*] The Court in making an order, upon a decree for dissolution of marriage, that the husband shall pay to his wife an annual sum of money for her permanent maintenance, has, under 20 & 21 Vict. c. 85, s. 32, an absolute discretion, according to the circumstances of each case, either to order the payment during the whole of her life or so long as she remains unmarried—The decision of Butt, J. (14 P. D. 175), refusing to confine the operation of an order under 20 & 21 Vict. c. 85, s. 32, to such period as the petitioner remained unmarried, affirmed. Lister *v.* Lister - - - C. A. 4

2. —— *Default in Payment—Enforcement of final Order by Attachment.*] A decree having been made absolute for a divorce on the wife's petition, the husband, as part of the final order, was directed to pay a permanent maintenance to his wife at the rate of 200*l.* a year:—*Held*, that the Court had no power to grant an attachment against the husband for non-payment of arrears of the annuity due under the order. De Lossy *v.* De Lossy - - - - - 115

—— Husband—Restitution of conjugal rights—Disobedience by wife - - 118
See Restitution of Conjugal Rights. 4.

MARRIAGE—*Foreign Law—Marriage between British Subject and Native of Japan—Monogamous Marriages—Legitimacy Declaration Act,* 1858 (21 & 22 *Vict. c.* 93). In a petition to establish the validity of a marriage under 21 & 22 Vict. c. 93, it appeared that the petitioner, who was a British subject with an Irish domicil of origin, and temporarily resident in Japan, had married a Japanese woman in Japan, according to the forms required by the law of the country. —Evidence having been adduced which shewed that the marriage was valid according to the law of Japan, and that by such a marriage the petitioner was precluded from marrying any other woman during the subsistence of the marriage:—*Held*, that the marriage was valid in this country. Brinkley *v.* Attorney-General - - 76

MONEY IN COURT—Divorce—Order for payment to Queen's Proctor - - - 161
See Collusion. 2.

NULLITY—*Alleged Insanity of Petitioner—Guardian—Order under rule 196, Additional Rules and Regulations—Practice.*] An order ought not to be made under rule 196 assigning a

NULLITY—*continued.*
guardian ad litem to a person alleged to be of unsound mind where there is a substantial dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian. Fry v. Fry. [*See next case*] - - - 25

2. —— *Alleged Insanity of Petitioner—Guardian ad litem—Order under rule* 196.] An order ought not to be made under rule 196, assigning a guardian ad litem to a person alleged to be of unsound mind, where there is a substantial and bonâ fide dispute as to the unsoundness of mind of the person to whom it is proposed to assign the guardian.—Order of Butt, J. (ante, p. 25) affirmed. —Whether rule 196 applies where the person has not been found lunatic by inquisition, *quære.* Fry v. Fry - - - - C. A. 50

PRACTICE — *Service of Citation — Registered Letter.*] In a petition for divorce it appeared that the respondent and co-respondent were residing together abroad, and that by the law of the place where they resided the co-respondent, a foreigner, had a right of action against any person serving him with English process:—*Held,* that the citation might be served on the co-respondent by inclosing it in a registered letter addressed to him, another copy being sent to the respondent so as to make it more probable that it would come to his knowledge. Trubner v. Trubner and Cristiani - - - - 24

—— Attachment—Contempt of Court—Appeal to Court of Appeal - - 59
See Appeal.

—— Motion to dispense with co-respondent 131
See Co-Respondent.

QUEEN'S PROCTOR—Intervention—Rescission of decree nisi—Security for wife's costs
See Costs. 1, 2. [32, 126

—— Intervention—Money in Court—Payment out to Queen's Proctor - - 161
See Collusion. 2.

REGISTRATION — Lands Charges Registration and Searches Act, 1888—Summons to vacate registration - - - 116
See Sequestration.

RESTITUTION OF CONJUGAL RIGHTS—*Written Demand—Additional Rules and Regulations,* 1875, *r.* 175—*Practice.*] In a petition by the wife for restitution of conjugal rights it appeared that after eleven years' separation, and before filing the petition, she addressed a letter to her husband formally demanding a return to co-habitation, and threatening to commence legal proceedings in the event of a refusal:—*Held* (following *Field* v. *Field* (14 P. D. 26)), that this was not a proper demand within the meaning of rule 175 of the Additional Rules and Regulations, 1875. Smith v. Smith. [*See next case*] - - 11

2. —— *Written Demand—Additional Rules and Regulations,* 1875, *r.* 175—*Practice.*] In a petition by a wife for restitution of conjugal rights it appeared that after eleven years' separation, and before filing the petition, she addressed a letter to her husband expressing a desire to return to cohabitation, and demanding restitution of conjugal rights, and threatening to commence legal proceedings in case of refusal. The husband acknowledged the receipt of his wife's letter, but refused to receive her back:—*Held,* reversing the decision of Butt, J. (ante, p. 11), that the wife's letter was a sufficient written demand within the meaning of rule 175 of the Additional Rules and Regulations, 1875, and that she was entitled to a decree for restitution of conjugal rights.—*Field* v. *Field* (14 P. D. 26) distinguished. Smith v. Smith - C. A. 47

3. —— *Refusal of Husband to comply with Decree — Periodical Payments — Proportion of Husband's Income payable to the Wife—Deductions from Husband's Income on account of Losses in Business — Matrimonial Causes Act,* 1884 (47 & 48 *Vict. c.* 68), *s.* 2.] By the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), the Court may, after a decree for restitution of conjugal rights upon the application of the wife, order that in the event of such decree not being complied with the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation.—Where a husband had not complied with a decree of restitution of conjugal rights obtained by the wife within the time named in the decree, the Court ordered that he should secure to her for their joint lives a "periodical payment" equal to one-third of their joint incomes. —In estimating the amount of the husband's average income the Court refused to allow a deduction in respect of losses sustained by him during the previous three years in a branch of his business which had been closed. Theobald v. Theobald - - - - - 26

4. —— *Disobedience of Decree by Wife — Order for Settlement on Husband out of Wife's Income under the Marriage Settlement—Matrimonial Causes Act,* 1884 (47 & 48 *Vict. c.* 68), *s.* 3.] Where a wife had refused to obey a decree of restitution of conjugal rights, and was in the enjoyment of a separate income, part of which was payable under the trusts of the marriage settlement, the Court ordered her to settle a permanent maintenance on her husband. Swift v. Swift - - - - - - 118

RULES:—
—— r. 175 - - - - 11, 47
See Restitution of Conjugal Rights. 1, 2.

—— r. 196 - - - - 25, 50
See Nullity. 1, 2.

SCOTCH LAW — Settlements, variation of — Divorce—Settlement in Scotch form 186
See Settlements, Variation of. 2.

SETTLEMENTS—*Order for Variation — Refusal to make further Variation — Subsequent circumstances*—22 & 23 *Vict. c.* 61, *s.* 5.] A decree absolute for a divorce having been pronounced on the husband's petition, an order was subsequently made varying the marriage settlements, and directing the wife to pay to the husband 300*l.* a year. Some years afterwards application was

SETTLEMENTS—*continued.*
made by the wife to reduce the amount of the payment to 150*l.* a year, on the ground that in consequence of the depreciation of securities her income was materially reduced:—*Held*, following *Gladstone* v. *Gladstone* (1 P. D. 440), that the application could not be entertained. BENYON *v.* BENYON. [*See next case*] - - - 29

2. —— *Power to alter Order for Variation of Settlement*—22 & 23 *Vict. c.* 61, *s.* 5.] *Held*, affirming the decision of Butt, J., that the power given to the Court by 22 & 23 Vict. c. 61, s. 5, of varying settlements after a final decree for dissolution of marriage, is a power to be exercised once for all, and an order made under it is not liable to be varied on the ground of a change of circumstances since the date of the order. BENYON *v.* BENYON [C. A. 54

SETTLEMENTS, VARIATION OF—*Settlement in Scotch Form—Variation*—22 & 23 *Vict. c.* 61, *s.* 5.] A decree for dissolution of marriage having been granted on the husband's petition, it appeared that the respondent, a Scotchwoman, was married in Scotland to the petitioner, an Englishman, and that in contemplation of the marriage there had been a settlement of her property according to the Scotch law:—*Held*, that under 22 & 23 Vict. c. 61, s. 5, the Court had power to order a variation of the settlement. NUNNELEY *v.* NUNNELEY AND MARRIAN - - - - - 186

SEQUESTRATION—*Registration—Lands Charges Registration and Searches Act*, 1888 (51 & 52 *Vict. c.* 51)—*Summons to Vacate Registration—Jurisdiction.*] A husband being in default for non-payment of alimony and costs, writs of sequestration were issued to enforce payment, and were duly registered under the Lands Charges Act, 1888. Before the sequestrators could sell the property in respect of which the writs had been issued, the husband assigned his interest therein, and the assignee having satisfied the claims, by paying an agreed sum into Court, the petitioner, with the concurrence of all parties, applied to discharge the sequestrators and to vacate the registration of the writs:—*Held*, that there was no power under the Act to order the registration of the writs to be vacated. COOK *v.* COOK 116

STATUTES:—
20 & 21 Vict. c. 85, s. 28 - - - 131
See CO-RESPONDENT.
—— —— ss. 30, 31 - - - 66
See COLLUSION.
—— —— s. 32 - - - - 4
See MAINTENANCE.
—— —— s. 51 - - - - 126
See COSTS. 2.
21 & 22 Vict. c. 93 - - - 76
See MARRIAGE.
22 & 23 Vict. c. 61, s. 5 - - 29, 54, 186
See SETTLEMENTS, VARIATION OF. 1, 2, 3.
23 & 24 Vict. c. 144, s. 7 - - - 66
See COLLUSION. 3.
36 & 37 Vict. c. 66, s. 49 - - - 126
See COSTS. 2.
41 & 42 Vict. c. 19, s. 2 - - - 126
See COSTS. 2.
47 & 48 Vict. c. 68, s. 3 - - - 118
See RESTITUTION OF CONJUGAL RIGHTS. 4.
51 & 52 Vict. c. 51 - - - 116
See SEQUESTRATION.

WORDS:—"Criminal cause or matter" - 59
See APPEAL.

ADMIRALTY.

APPEAL—County Court—Interlocutory order—Appeal from County Court to Divisional Court - - - - 121
See COUNTY COURT.

ARBITRATION—Mutual insurance company—Hearing—Estoppel. - - 189
See COLLISION. 7.

ARREST—Mortgagee—Arrest of ship by master—Payment of claim by mortgagee—Right to indemnity from owners - 38
See SHIP.

CASES:—
—— *Davies* v. *M'Veagh* (4 Ex. D. 265) followed - - - - 98
See SHIP.
—— *Imbro, The* (14 P. D. 73) considered - 166
See COLLISION.
—— *Murphy* v. *Coffin* (12 Q. B. D. 87) dissented from - - - - - 93
See SHIP.

CHARTERPARTY—Demurrage—Place of unloading - - - - 93
See SHIP. 2.

CHARTERPARTY—*continued.*
—— Exception—Negligence of crew—"Voyage" Warranty of seaworthiness—General average contribution - - 203
See SHIP. 3.
—— Exception—Negligence of crew—Voyage
See SHIP. 4. [208

COLLISION—*Damages, Measure of—Loss of Equipment for Navigation.*] A collision took place between a steamer and a barque, the steamer being alone to blame. The steering compass, charts, log and log glass of the barque were lost through the collision. The captain of the barque made for a port of safety, navigating his ship by a compass which he found on board. The barque while on her way, without any negligence on the part of the captain or crew, and owing to the loss of the requisites for navigation above mentioned, grounded, and was necessarily abandoned:—*Held*, by the Court of Appeal, that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damages caused thereby. THE CITY OF LINCOLN - C. A. 15

2. —— *Lights—Infringement of Regulations*

COLLISION—*continued.*

for Preventing Collisions at Sea, art. 6—Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *s.* 17.] In an action of collision it was proved that the lights carried by one of the vessels were so fixed as to be partially obscured, and that there was therefore an infringement of art. 6 of the Regulations:—*Held*, by Butt, J., that, under the Merchant Shipping Act, 1873, s. 17, the vessel whose lights were thus obscured must be held to have been in fault, without any inquiry as to whether such obscuration could possibly have been a cause of the collision:—*Held*, by the Court of Appeal, reversing the decision of Butt, J., that, in the circumstances, it was the duty of the Court to inquire into the facts in order to ascertain whether the infringement of the Regulations could possibly have contributed to the collision, and that, inasmuch as it appeared from inquiry into the relative positions of the two vessels that the obscuration of the lights could not possibly have caused the accident, the vessel carrying such lights was not to blame. THE DUKE OF BUCCLEUCH - - - - C. A. 86

3. —— *Humber Rules, No. 2—Height of Light.*] By rule 2 of the Humber Rules, a vessel with two masts at anchor in the Humber shall exhibit an after-riding light "double the height of the bow light":—*Held*, that the rule must be taken to mean that the after light shall be at least double the height of the bow light, but that it need not be exactly double the height of such light, and that a vessel carrying an after light of a height five feet more than double that of the bow light had not infringed the rule. THE MAGNETA - - - - (Div. Ct.) 101

4. —— *Compulsory Pilotage—River Burry—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 353—6 & 7 *Vict. c. lxxxviii.—Counter-claim—Costs.*] Pilotage in the case of vessels trading to the port of Llanelly was by law compulsory before the Merchant Shipping Act, 1854, and, therefore, by s. 353 continues to be compulsory. In an action of damage arising out of a collision the plaintiffs' claim was dismissed without costs, the Court having found that the defendants' vessel was alone to blame for the collision, but that they were exempt from liability on the ground of compulsory pilotage. The defendants had counter-claimed:—*Held*, that, under the circumstances, the plaintiffs were entitled to have the counter-claim dismissed with costs. THE RUBY - 139

5. —— *Compulsory Pilotage—River Burry—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 353—6 & 7 *Vict. c. lxxxviii.*] Pilotage in the case of vessels trading to or from the port of Llanelly is compulsory. THE RUBY C. A. 164

6. —— *Lights—Regulations for Preventing Collisions at Sea—Article* 11.] By article 11 of the Regulations for Preventing Collisions at Sea, "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light." The plaintiffs' barque was proceeding in tow of a tug in the North Sea, about eleven miles off Whitby, and, in addition to the regulation side lights, had a light fixed to her stern. While so proceeding, she was struck by an overtaking vessel:—*Held*, by Sir James Hannen, that, having regard to the circumstances at the time of the collision, the barque had not infringed article 11 by carrying a fixed stern light.—*The Imbro* (14 P. D. 73) considered. THE STAKESBY 166

7. —— *Trawler—Regulations for Preventing Collisions at Sea—Art.* 10 (*d*)—*Mutual Collision Club—Arbitration.*] By art. 10 (*d*) of the Regulations for Preventing Collisions at Sea, "if a vessel when fishing becomes stationary, in consequence of her gear getting fast to a rock or other obstruction, she shall shew the light and make the fog signal for a vessel at anchor":—*Held*, that the rule is applicable although the weather, when the vessel becomes stationary, is clear. In an action for collision, it appeared that the plaintiff's vessel and the defendant's vessel were insured in a mutual insurance company, by the rules of which it was provided that, in the event of a collision occurring between two vessels insured in the company, &c., the owners of such vessels should immediately submit a statement of the whole circumstances of the collision . . . . . and the directors, after receiving such statement, should have power to arbitrate on the matter, and their decision should be final. The plaintiff gave notice of the collision to the secretary of the company. The secretary obtained statements as to the collision from the master of the plaintiff's vessel, and from the master of the defendant's vessel. A meeting of directors was held, at which the defendant's master was present, but no one on behalf of the plaintiff, and a resolution was passed that the defendant's vessel had not been in collision with that of the plaintiff:—*Held*, that there had never been a proper hearing of the case by the directors; that the resolution passed by them was therefore not an arbitration within the meaning of the rule, and that the plaintiff was not estopped by it from bringing an action for damage. *Semble*, that the rule must be taken to mean that it should be a condition precedent to an arbitration that both parties had agreed as to the fact of a collision having taken place. THE WARWICK - - (Div. Ct.) 189

8. —— *Foreign River—Steam Vessels proceeding one up and the other down River—Navigation.*] In an action for collision between two vessels under steam in the River Scheldt, it appeared that the vessels were proceeding in opposite directions, the one up and the other down the river, and that the vessel going up the river had the tide against her. The collision took place at a strong bend of the river. It did not appear that any positive rule had been printed and circulated with regard to the navigation of the river; but, by the practice of navigation there, it was the duty of a vessel navigating against the tide to wait until a vessel coming in the opposite direction had cleared her at the bend:—*Held*—upon proof that the vessel navigating against the tide had disregarded this practice—that she must be taken to have been to blame for the collision. THE TALABOT - - - - - 194

9. —— *Tug and Vessel in Tow—Collision with third Vessel through Negligence of Tug—Liability of Vessel in Tow.*] No general rule can be laid down as to the liability of a vessel in tow for a collision between it and a third vessel occasioned

COLLISION—*continued.*

by the negligence of those on board the tug. Whether the relation of master and servant exists between the owners of the vessel in tow and the crew of the tug, so as to make the former liable, depends upon the circumstances of each case. THE QUICKSTEP - - - (Div. Ct.) 196

—— Inevitable accident—Costs—Appeal 37
See COSTS.

COSTS—*Appeal—Inevitable Accident.*] In an action for collision the Admiralty Division held that the defendants' vessel was solely to blame for the collision. The Court of Appeal reversed this decision, holding that the collision was caused by inevitable accident:—*Held*, that the case was within the general rule that in all appeals the unsuccessful party must bear the costs, except under special circumstances; but the Court having regard to the way in which the case had been conducted by the defendants, ordered that they should only receive the costs of the appeal, and that both parties should bear their own costs in the Court below. THE BATAVIER C. A. 37

—— Salvage—Inequitable Agreement—Compulsion - - - - - 135
See SALVAGE. 2.

COUNTY COURT—*Appeal from County Court to Divisional Court—Interlocutory Order—Costs of Witnesses—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 26—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*County Court Rules*, 1889, *Order* L., *r.* 16.] By s. 26 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), an appeal may be made to the High Court of Admiralty by permission of a judge of a county court from any interlocutory order therein.—By s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), the party aggrieved by the judgment, direction, decision or order of a county court judge may appeal from the same to the High Court.—By Order L., r. 16, of the County Court Rules, 1889, the costs of witnesses, whether they have been examined or not, may, unless otherwise ordered by the judge, be allowed.—On an appeal, without leave, from an interlocutory order made by a county court judge, disallowing the costs of witnesses not called, on the ground that no application for their expenses had been made to him at the trial:—*Held*, that the Admiralty Division had no jurisdiction to entertain the appeal, for such an order was not within s. 120 of the County Courts Act, 1888, and therefore s. 26 of the County Courts Admiralty Jurisdiction Act, 1868, still applied:—*Held*, also, that Order L., r. 16, of the County Court Rules, 1889, being a general rule relating to county courts, could not be modified by the practice established by the judge of a particular county court. THE CASHMERE [Div. Ct. 121

—— Admiralty—Appeal from County Court to Divisional Court—Interlocutory order
See COUNTY COURT. [121

DAMAGES, MEASURE OF—Collision—Loss of equipment for navigation - - 15
See COLLISION.

DEMURRAGE—Charterparty—Place of unloading - - - - - 98
See SHIP. 2.

GENERAL AVERAGE—Right to contribution—Negligence of crew—Exception in charterparty - - - - 203
See SHIP. 3.

HUMBER RULES—Height of light - 101
See COLLISION. 3.

INSURANCE (MARINE)—Mutual insurance society—Arbitration—Estoppel - 189
See COLLISION. 7.

INTERLOCUTORY ORDER—County Court—Admiralty—Appeal from County Court to Divisional Court - - - 121
See COUNTY COURT.

INTERROGATORIES—Collision—Practice 134
See PRACTICE.

LIGHTS—Infringement of regulations for preventing collisions at sea - - 86
See COLLISION. 2.

—— Humber rules, No. 2—Height of light 101
See COLLISION. 3.

—— Sailing rules—Article 11 - - 166
See COLLISION. 6.

MORTGAGEE—Arrest of ship by master—Payment of claim by mortgagees—Right to indemnity from owners - - 38
See SHIP.

NAVIGATION—Foreign river—Steam vessels proceeding one up and the other down river—Navigation - - - 194
See COLLISION. 8.

PILOTAGE (COMPULSORY)—River Burry
See COLLISION. 4, 5. [139, 164

PRACTICE—*Interrogatories—Collision.*] In an action of damage arising out of a collision in which the plaintiffs' vessel was lost, with all of the crew who could give evidence as to the collision, the plaintiffs were allowed to administer interrogatories to the owners of the defendants' vessel as to the circumstances of the collision. THE ISLE OF CYPRUS - - - - 134

—— Admiralty—Appeal—Inevitable accident
See COSTS. [37

RULES:—

—— Order L., r. 16 - - - - 121
See COUNTY COURT.

SAILING RULES—Lights—Infringement of regulations for preventing collisions at sea, art. 6 - - - - 86
See COLLISION. 2.

—— Humber rules, No. 2—Height of light 101
See COLLISION. 3.

—— Lights—Article 11 - - - 166
See COLLISION. 6.

SAILING RULES—*continued.*

—— Regulations for preventing collisions at sea —Article 10 (*d*) - - - 189
See Collision. 7.

SALVAGE — *Passengers — Cattle-keepers.*] A steamer having on board a cargo of cattle in charge of a number of men who were paid by the owners of the cattle, but who were nominally on the ship's books, fell in with a derelict ship in the Atlantic and towed her to Queenstown. The service caused the voyage to be a day and three quarters longer than it would otherwise have been, but the keepers of the cattle did not assist in the service in any way:—*Held*, that they were not entitled to participate in the remuneration payable for the salvage service. The Coriolanus [103

2. —— *Inequitable Agreement—Compulsion—Costs.*] A steamer fell in with another steamer in the Atlantic, which had lost part of her propeller, was leaking, and could not use her engines. The vessel in distress was towed by the other vessel to Halifax, a distance of about 350 miles. Before the service was begun the masters of the salving and salved vessels signed an agreement that the owners of the salved vessel should pay 5000*l.* for the service or a sum for work done if it was unsuccessful. The master of the salving vessel would not take a less sum, and the master of the salved vessel had reasonable grounds for believing and believed that his vessel would be abandoned if he did not sign the agreement. The sum of 5000*l.* was more than one-fifth of the total value of the salved vessel, her cargo and freight:—*Held*, that the agreement must be taken to have been made under compulsion, and could not be enforced, having regard to the fact that the sum stipulated for was exorbitant.—The Court, treating the agreement as inoperative, awarded the salvors 3000*l.* as a fair remuneration for the services, and allowed them their costs of the action. The Mark Lane - - 135

3. —— *Contract of Towage — Property in salved Vessels—Action in personam.*] The plaintiffs, the owners of a steam-tug, entered into a contract with the defendants, who were in possession of five steel barges, by which the tug was to tow the barges from Chepstow to Portland for an ascertained sum. The tug and barges during the progress of the towage were twice obliged to seek shelter, and the barges twice broke adrift, and had to be saved by the tug, and on one of these occasions the tug saved the lives of some of the bargemen. At the end of the towage two of the barges were given up to the Government, with whom the defendants were under a contract to build and deliver the barges. An action of salvage was brought in personam against the defendants in respect of alleged salvage services to these two barges, and in rem against the remaining three barges:—*Held*, that the plaintiffs were entitled to salvage, and that an action in personam would lie against the defendants. Five Steel Barges - - - - - 142

SHIP—*Mortgagee—Arrest of Ship by Master—Payment of Claim by Mortgagee—Right to Indemnity from Owners.*] The plaintiffs were mortgagees of forty-eight sixty-fourth shares in a vessel. The master having brought an action in rem against the vessel and arrested her, the plaintiffs paid the amount of his claim in order to obtain the release of the vessel from arrest and to enable them to take possession under their mortgage. The plaintiffs then sued the defendants, the owner of sixteen sixty-fourth shares, to recover the amount paid to the master:—*Held*, that as the mortgagor and the other co-owners were severally liable for the disbursements paid by the master, and as the plaintiffs could not obtain possession of their shares as long as the vessel was under the arrest of the Court, they were entitled to recover from the defendants the amount paid by them. The Orchis - - C. A. 38

2. —— *Charterparty—Demurrage — Place of Unloading.*] By the terms of a charterparty the ship was to load a cargo of coals at Glasgow, and therewith "proceed to Odessa, or so near thereto as she might safely get, and deliver the same to the said freighters or assigns alongside any safe wharf, store, craft, steamer, depot, ship, or arsenal, as ordered by receiver. Cargo to be discharged at the average rate of not less than 330 tons per working day, Sundays and holidays excepted, and ten days on demurrage over and above the said lay days at 16*s.* 8*d.* per hour, except, &c. Time for loading and unloading to commence from the time the steamer is ready, and intimation has been given in writing." The ship arrived at Odessa on November 16. Due notice was given on the same day of her readiness to discharge cargo, and she was ordered to discharge alongside the wharf or quay, which was the usual place for the discharge of coal cargoes at Odessa. She did not get alongside the quay till November 20, the berths being occupied. In an action for demurrage:—*Held*, that the time for discharging commenced from the time when intimation of the ship's readiness to discharge in the port was given, and not from the time of her arrival alongside the quay.—*Davies* v. *M'Veagh* (4 Ex. D. 265) followed. *Murphy* v. *Coffin* (12 Q. B. D. 87) dissented from. The Carisbrook - - 98

3. —— *Charterparty—Exception—Negligence of Crew—"Voyage"—Warranty of Seaworthiness—General average Contribution.*] By a charterparty it was agreed that the defendants' steam vessel should go to New Fairwater, and there load from the agents of the plaintiffs a cargo of sugar and proceed therewith to Greenock, the defendants not to be responsible "for any act, neglect, or default whatsoever of their servants during the said voyage." The agents commenced loading the vessel with sugar belonging to the plaintiffs, and during the loading the cargo was damaged by water through a valve in the engine-room having been negligently left open by one of the engineers of the vessel:—*Held*, that the term "voyage" included the period of time during which the vessel was being loaded, and that consequently the damage was within the exception and the defendants were not liable.—The defendants counterclaimed for a general average contribution from the plaintiffs:—*Held*, that their right to contribution was not affected by the negligence of their servants, for which by the terms of the exception they were not responsible,

SHIP—*continued.*
and that they were entitled to recover. The Carron Park - - - - - 203

4. —— *Charterparty—Exception—Negligence of Crew—Voyage.*] By charterparty it was agreed that the defendants' vessel should carry a cargo of rice for the plaintiffs to London. The charterparty excepted the defendants from liability "for any act, negligence or default of master or crew in the navigation of the ship in the ordinary course of the voyage." The vessel, on her arrival in London, went into the Victoria Dock to discharge her cargo. While this was being done, the cargo was damaged by water which got into the vessel through negligence in the removal of a bilge-pump:—*Held*, that assuming that the negligence which caused the damage was negligence on the part of the crew, it was not "negligence in the navigation of the ship in the ordinary course of the voyage" within the meaning of the exception, and that the defendants were liable. The Accomac - - - - C. A. 208

STATUTES:—
6 & 7 Vict. c. lxxxviii. - - 139, 164
See Collision. 4, 5
17 & 18 Vict. c. 104, s. 353 - 139, 164
See Collision. 4, 5
31 & 32 Vict. c. 71, s. 26 - - - 121
See County Court.
36 & 37 Vict. c. 85, s. 17 - - - 86
See Collision. 2.
51 & 52 Vict. c. 43, s. 120 - - 121
See County Court.

TOWAGE—Contract of towage—Property in salved vessels—Action in personam 142
See Salvage. 3.
—— Tug and vessel in tow—Collision with third vessel through negligence of tug—Liability of vessel in tow - - 196
See Collision. 9.

WORDS:—"Voyage" - - 203, 208
See Ship. 3, 4.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.